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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 160

HOME GAS COMPANY and THE MANUFACTURERS LIGHT AND HEAT COMPANY,
Petitioners,

v.

FEDERAL POWER COMMISSION, CENTRAL HUDSON GAS & ELECTRIC CORPORATION and ROCKLAND LIGHT AND POWER COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	PAGE
INDEX	i
INDEX OF AUTHORITIES	ii
TITLE PAGE	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
The Statute Involved	2
Statement	3
Central Hudson	4
Rockland	7
Qualitative Nature of the Displacement Ordered	8
The Commission's Findings and Opinion	9
Decision of the Court of Appeals	10
REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT	10
1. This case involves an important question of Federal law which has not been, but should be, settled by this Court	10
2. The Court of Appeals has decided a Federal question in conflict with applicable decisions of this Court	14
CONCLUSION	20

PAGE

APPENDICES:

Appendix A—Opinion of the United States Court of Appeals for the District of Columbia Circuit 21

Appendix B—Judgment of the United States Court of Appeals for the District of Columbia Circuit 31

Appendix C—Natural Gas Act, Section 7 32

Appendix D—Arithmetical error in Order Denying Rehearing 37

INDEX OF AUTHORITIES

DECISIONS:

Black Hawk Motor Transit Co. v. *Ill. Commerce Commission*, 398 Ill. 542, 76 N. E. 2d 478 (1947) 15

Chicago, R. I. & P. Ry. v. *Ill. Comm. Comm'n*, 414 Ill. 134, 111 N. E. 2d 136 (1953) 15

Democrat Printing Co. v. *Federal Communications Comm'n*, 202 F. 2d 298 (D. C. Cir. 1952) 14

Federal Communications Commission v. *National Broadcasting Co.*, 319 U. S. 239 (1943) 14, 15

Federal Communications Comm'n. v. *RCA Communications, Inc.*, 346 U. S. 86 (1953) 11

Federal Power Commission v. *Hope Natural Gas Company*, 320 U. S. 591 (1944) 13

Home Gas Company, 8 F. P. C. 1322 (1949)..... 5

Home Gas Company, 3 F. P. C. 895 (1943) 7

Interstate Commerce Comm'n v. *Parker*, 326 U. S. 60 (1945) 16

Kentucky Natural Gas Corporation v. *F. P. C.*, 159 F. 2d 215 (6th Cir. 1947) 9, 18

PAGE

Lorain-Amherst Transit v. *P. U. C. O.*, 147 Ohio St. 376, 71 N. E. 2d 705 (1947) 15

Luckenbach S. S. Co. v. *U. S.*, 122 F. Supp. 824, *aff'd per curiam without opinion*, 347 U. S. 984 (1954) 17

Panhandle Eastern Pipe Line Co. v. *F. P. C.*, 324 U. S. 635 (1945) 13

Panhandle Eastern Pipe Line Co. v. *F. P. C.*, 219 F. 2d 729 (3d Cir.), *cert. denied*, 349 U. S. 945 (1955) 11, 18

Panhandle Eastern Pipe Line Co. v. *F. P. C.*, 169 F. 2d 881 (D. C. Cir.), *cert. denied*, 335 U. S. 854 (1948) 9, 11, 18

Texas & Pacific Ry. v. *Gulf C. & S. F. Ry.*, 270 U. S. 266 (1926) 11

Theel Bros. Rapid Transit Co. v. *Great Northern Ry., Re*, 72 N. D. 280, 6 N. W. 2d 560 (1942) ... 15

Tri-State Broadcasting Co., Inc. v. *Federal Communications Comm'n.*, 96 F. 2d 564 (D. C. Cir. 1938) 17

Tri State Transit Co. v. *Dixie Greyhound Lines*, 197 Miss. 37, 19 So. 2d 441 (1944) 15

United Gas Pipe Line v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956) 12

United States v. *Detroit Navigation Co.*, 326 U. S. 236 (1945) 17

United States v. *Seatrain Lines*, 329 U. S. 424 (1947) 14, 15

Whitfield Transp. v. *Tucson Warehouse & Transf. Co.*, 78 Ariz. 136, 276 P. 2d 954 (1954) 15

Wilson v. *Federal Communications Comm'n*, 170 F. 2d 793 (D. C. Cir. 1948) 14

STATUTES:

Ariz. Code Anno. § 66-506 (1939) 15

PAGE

Federal Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. §§ 151-609 (1952) 11

Interstate Commerce Act,
Part I, 24 Stat. 379, as amended, 49 U. S. C. §§ 1 *et seq.* 11

Part II, 49 Stat. 543, as amended, 49 U. S. C. §§ 301-327 (1952) 16

Part III 54 Stat. 929, as amended, 49 U. S. C. §§ 901-923 (1952) 17

Natural Gas Act, 52 Stat. 821-833 (1938), as amended, 56 Stat. 83-84 (1942), 61 Stat. 459 (1947), 15 U. S. C. §§ 717-717w (1952), cited throughout

N. C. Gen. Stat. §62-121.52(7) (1950)..... 15

N. D. Rev. Code of 1943, § 49-1814 15

Ore. Rev. Stat. § 757.060(2) (1955) 15

United States Code, Judiciary and Judicial Procedure, 28 U. S. C. § 1254(1) 2

OTHER:

Address by Jerome K. Kuykendall, Chairman, Federal Power Commission, before the Annual Convention of the American Gas Association, October 26, 1953 14

Barnes, *The Economics of Public Utility Regulation*, 231-32, 755 (1942)..... 15

Federal Power Commission, Thirty-fifth Annual Report to Congress, 1955 (1956) 10

Federal Power Commission Regulations,
18 C. F. R. § 157.14(10) (1949 ed.) 13
18 C. F. R. § 157.14(11) (1949 ed.) 13

Hearings before the House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess., on H. R. 5249, July 10 and 11, 1941 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

HOME GAS COMPANY and THE MANUFACTURERS LIGHT AND HEAT COMPANY, *Petitioners,* v. FEDERAL POWER COMMISSION, CENTRAL HUDSON GAS & ELECTRIC CORPORATION and ROCKLAND LIGHT AND POWER COMPANY, *Respondents.*	No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered March 15, 1956. Said judgment affirmed an Order of the Federal Power Commission issued on February 11, 1955, under review by the Court of Appeals pursuant to Section 19(b) of the Natural Gas Act.

Opinions Below.

The Federal Power Commission's Order Directing Physical Connection of Facilities and Sales of Natural Gas, issued February 11, 1955, and its Order Denying Rehear-

ing issued April 4, 1955, are unreported and are printed in the Joint Appendix at pages 40a-51a and 94a-103a.*

The opinion of the Court of Appeals is reported at 231 F. 2d 253 and is printed in Appendix A (pages 21 to 30). The judgment of the Court of Appeals is unreported and is printed in Appendix B (page 31).

Jurisdiction.

The judgment of the Court of Appeals, affirming the Orders of the Federal Power Commission, was entered March 15, 1956.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented.

Under the Natural Gas Act, where a certificated supplier of natural gas, with a substantial investment in capacity and facilities for service to its distributor customers, is rendering full and adequate service to such customers,

(1) is the Federal Power Commission authorized to *displace* such supplier as to a substantial portion of its existing service by directing another natural gas company to supply gas to the same customers?

(2) is the Commission authorized by such means to deprive such supplier of the opportunity to participate in the future growth of its customers' requirements?

The Statute Involved.

This case arises under the Natural Gas Act, 52 Stat. 821-833 (1938), as amended, 56 Stat. 83-84 (1942), 61

*References marked Appendix A, B, C or D are to the Appendices to this Petition, "J. App." to the Joint Appendix of the Parties before the Court below and "R." to the Record.

Stat. 459 (1947), 15 U. S. C. §§ 717-717w (1952). The Section of the Act here pertinent is Section 7, the applicable portions of which are set forth in Appendix C (pages 32 to 36).

Statement.*

Petitioners are "natural gas companies" subject to the jurisdiction of the Commission under the Natural Gas Act.** Respondent companies are engaged in the retail distribution of natural gas in New York State, Central Hudson through a system in the Hudson Valley; Rockland in Orange and Rockland Counties, N. Y., which include a rapidly growing suburban area northwest of New York City. Home (directly) and Manufacturers (indirectly, as the sole supplier of natural gas to Home) supply natural gas to Central Hudson and Rockland and for many years were their sole suppliers (see maps of the system of Central Hudson, Ex. 159 Sheet 1, R. 10836, J. App. 105a; of Rockland, Ex. 165 Sheet 1, R. 10859, J. App. 117a; and of Home, Ex. 215, R. 10912, J. App. 134a).

Home holds Certificates issued to it by the Commission to serve Respondent companies.

By the Order herein complained of, the Commission ordered Tennessee, a long-distance pipe line supplier bring-

*The following short titles will be used: *Home*—Home Gas Company, *Manufacturers*—The Manufacturers Light and Heat Company (Petitioners herein); *Central Hudson*—Central Hudson Gas & Electric Corporation, *Rockland*—Rockland Light and Power Company, *the Commission*—the Federal Power Commission (Respondents); *Tennessee*—Tennessee Gas Transmission Company (not a party hereto). Certificates of Public Convenience and Necessity are hereinafter sometimes referred to as "Certificates".

**Petitioners are wholly owned subsidiaries of The Columbia Gas System, Inc., (J. App. 349a) a registered holding company, which, through subsidiaries, owns and operates an interconnected natural gas system.

ing gas from the Southwest, to deliver gas to Respondent companies in volumes which (as the Commission's Order Denying Rehearing expressly recognized—tabulation, J. App. 101a) would displace gas sold by Home to Respondent companies.

The effect of the Order, and the events which preceded its entry, will be described in turn as to Central Hudson and Rockland.

Central Hudson

The Commission's Order to Tennessee would cut Home's estimated annual sales to Central Hudson, as set forth in the Commission's tabulation in its Order Denying Rehearing, as follows:

From:	1955 annual sales of	2,211,000 Mcf.
To :	1956 annual sales of	1,281,000 Mcf.*

The history of Home's service to Central Hudson is as follows:

On September 21, 1949, Home and Central Hudson entered into a 20-year contract which provided as follows:

> "SECTION 1. *Gas to be Sold.* Seller hereby agrees to sell and deliver and Buyer hereby agrees to purchase and receive the total natural gas requirements of Buyer for the term of this agreement, provided Buyer notifies Seller, in writing, two (2) years in advance of any changes in its requirements. . . ." [Pet. Ex. Item K, by reference, R. 10965, J. App. 189a.]

*J. App. 101a. In that tabulation the annual sales by Home for 1955 and 1956, which we quote above, are correctly computed. But the annual sales shown in the tabulation for the following two years, 1957 and 1958, are erroneous because of arithmetical errors by the Commission, the explanation of which is set forth in Appendix D (pages 37 to 39).

On November 29, 1949, after hearings, the Commission issued its Findings and Order granting Home a Certificate to serve Central Hudson (8 FPC 1322-1323) in which it stated:

> "Home estimates it will have sufficient natural gas supplies to meet the needs of its existing customers and the needs of Central. . . .
>
> "The record further shows that on the basis of a sale of 1,460,000 M. c. f. to Central during the first full year of operation of the proposed facilities, applicant will realize an estimated net income of $47,505 after deductions for taxes and depreciation. . . ."

As contemplated by the 1949 contract and the initial Certificate, Central Hudson's gas requirements have grown. From the 1,460,000 Mcf. contemplated for the first full year of operation, annual requirements grew to the 2,211,000 Mcf. for 1955 shown by the Commission's tabulation in its Order Denying Rehearing (J. App. 101a).

Under Certificates issued by the Commission, Home has constructed at great expense and is operating facilities which (with certain normal, periodic additions by its affiliate, Manufacturers) are adequate to provide full service to Central Hudson and Home's other customers for a considerable period in the future (J. App. 337a-347a, 378a-379a, 387a-393a). Home's present facilities have resulted from a gradual year by year construction program, amounting to an investment of nearly $10,000,000 since 1946 (J. App. 345a).

Under Certificates issued by the Commission, Manufacturers has constructed at great expense and is operating facilities, including particularly its $5,000,000, 117-mile 14" transmission line running generally north and south

in the extreme eastern part of Pennsylvania (the Coatesville-Port Jervis line), to sell natural gas to Home, among others (J. App. 339a-340a). It and Home's other facilities enable Home to serve Central Hudson with gas received either from the west or from the south (J. App. 333a).

The Order of which Petitioners now complain was made in certain consolidated proceedings in which Tennessee was seeking to secure a Certificate to expand its facilities leading into New England (its Hebron, Pa.-Greenwich, Conn. line). In that proceeding Central Hudson filed an application (J. App. 22a-29a) requesting the Commission to direct, under Section 7(a) of the Act, that Tennessee establish a connection with Central Hudson and sell it natural gas. Central Hudson stated that it proposed to construct a 48-mile pipe line from its existing system northward to the proposed Tennessee connection (J. App. 25a). Central Hudson did not assert, nor has it since asserted, that Home is unwilling or unable to supply the volumes sought or that Home's service was inadequate.

Petitioners intervened and opposed Central Hudson's application (J. App. 32a-34a).

Tennessee answered Central Hudson's application and opposed it (J. App. 30a-31a).

The Commission ordered Tennessee (J. App. 40a-51a) to establish physical connection with and sell to Central Hudson up to specified volumes of natural gas. This would displace gas theretofore delivered by Home; the resulting curtailment in Home's sales to 1,281,000 Mcf. in 1956 is a 42% cut below its 1955 sales to Central Hudson and is even below the first year's 1,460,000 Mcf. contemplated in 1949 when the Certificate was granted. Furthermore, the

drastic curtailment will continue for the foreseeable future (See Appendix D, pages 37 to 39).

The Commission made no finding herein or in any other proceeding that the 20-year "total natural gas requirements" contract made between Home and Central Hudson in 1949 is not in full force and effect or is unreasonable or contrary to the public interest.

Rockland

The Commission's Order to Tennessee would cut Home's estimated annual sales to Rockland, as set forth in the tabulation in the Commission's Order Denying Rehearing (J. App. 101a), as follows:

From:	1955 sales of	3,808,605	Mcf.
To :	1956 sales of	3,549,395	Mcf.

Home's service to Rockland and its predecessor companies began over 20 years ago and has increased in volume gradually since that time (J. App. 350a-352a). On January 5, 1943, the Commission issued its "grandfather" Certificate (3 F. P. C. 895) and since that date Home has served Rockland under that and other subsequently granted Certificates. The service is now rendered under Home's "Contract Demand Schedule" in its filed tariff (Pet. Ex. Item I by reference, R. 5127-5128, J. App. 159a), pursuant to a service agreement signed by both parties in the form provided by the tariff (J. App. 352a-353a).

In 1954 Rockland received a second supply of natural gas from Algonquin Gas Transmission Company, a natural gas pipe line company serving the New England area. Rockland has never utilized the volumes already certificated from

Algonquin nor does it estimate that it will utilize such volumes until 1958 (J. App. 44a).

Rockland intervened in Tennessee's proceeding before the Commission, heretofore referred to, in which Tennessee requested a Certificate for the extension of its facilities into New England (J. App. 6a-10a). Rockland requested that the Commission order Tennessee to supply it with gas from its proposed new line.

Tennessee did not request authority to serve Rockland.

The Commission in its Order issued February 11, 1955, of which Petitioners complain (J. App. 40a-51a), ordered Tennessee to establish physical connection with and sell to Rockland up to certain specified volumes of natural gas, which would result in the curtailment of Home's sales set forth in the tabulation above.

The Order Denying Rehearing indicated that the 1956 curtailment would be temporary and that in 1957 and 1958 Home's sales to Rockland would be slightly higher than in 1955 (tabulation, J. App. 101a). However, these figures are based on an exhibit introduced by Rockland, and a witness for Rockland testified that if Rockland's total purchases in future years should turn out less than estimated ". . . the decrease in gas requirement would fall *entirely* on the Home Gas Company." (J. App. 315a, emphasis added)

Qualitative Nature of the Displacement Ordered

In addition to the large *quantitative* displacement of Home's sales (which the Commission expressly recognized that its Order would effect, tabulation J App. 101a) there is also a major *qualitative* displacement, equally adverse to Home. Home is displaced from the stable portion of the

Central Hudson and Rockland business—the high load factor portion—and is left with the widely fluctuating low load factor segment of the business.

Wholesale service of natural gas involves supplying the distributing company with gas to meet both the stable year-round requirements of its customers (for cooking and water heating) and the highly fluctuating requirements (for house-heating) which vary widely with seasonal and daily temperature changes. The wholesale supplier must provide facilities to meet the distributing company's peak requirements of the coldest winter day. When a supplier, who has invested large sums in providing such facilities, is deprived of the year-round stable portion of the distributing company's business, it is left with a "low load factor" residue while still shouldering all the major risks.

Witnesses for both Respondent companies testified that Home would receive the residue segment of their purchases and that in case of future declines the loss would fall on Home (Rockland J. App. 315a, 326a-327a; Central Hudson J. App. 307a).

The Commission's Findings and Opinion

The Commission asserted (J. App. 42a) that its authority under the Natural Gas Act to direct the action which it ordered had long been settled, citing *Panhandle Eastern Pipe Line Co.* v. *FPC*, 169 F. 2d 881 (D. C. Cir.), *cert. denied*, 335 U. S. 854 (1948). By its Order Denying Rehearing (J. App. 94a-103a), the Commission indicated that it believed it had "complete discretion" in the premises (citing Section 7(g) of the Act) and that the identical problems had been raised and settled in *Kentucky Natural Gas Corporation* v. *FPC*, 159 F. 2d 215 (6th Cir. 1947).

Decision of the Court of Appeals

Petition was filed with the Court of Appeals for review of the Commission's Orders pursuant to Section 19(b) of the Natural Gas Act. The Court of Appeals affirmed the Commission's Orders.* In so doing, it did not discuss the fact that they resulted in a displacement of Petitioners' service, but stated that it regarded the cases cited by the Commission as "dispositive of the present appeal" (Appendix A, pages 27 to 29). These cases are discussed at page 18 herein.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. This case involves an important question of Federal law which has not been, but should be, settled by this Court.

This case involves the extent of *legal* protection accorded to holders of Certificates issued under Section 7 of the Natural Gas Act.

This is of substantial national importance because on the basis of such Certificates tremendous investments have been made in the construction, on a nation-wide basis, of long distance natural gas pipe lines, compressor stations, storage fields and other facilities. These investments have amounted to hundreds of millions of dollars annually with a total in the billions. The Commission's most recent Annual Report to Congress (that for fiscal year 1955, published in 1956) stated on page 2:

> "Between February 7, 1942 (the date the certificate provisions of the Natural Gas Act became effective), and June 30, 1955, the Commission

*In addition to the Petition for Review, Petitioners also filed under Section 19(b) of the Natural Gas Act a petition asking that the Court direct the Commission to take additional testimony, on the grounds that the record was inadequate. The Court denied this motion.

> authorized a total of more than 64,000 miles of pipeline and nearly 4,400,000 horsepower in compressor units at a total estimated cost of more than $4,852,000,000."

This Court has never had before it a case which dealt with such Certificates or with Section 7 of the Act.* This Court has, however, rendered decisions involving somewhat comparable problems under the major Federal regulatory statutes providing for the issuance of Certificates and under the major statutes providing for the issuance of licenses to engage in particular regulated activities.**

The economics of the natural gas industry make this multibillion dollar natural gas investment more dependent on retention of the markets for which it was certificated than the investment in any other business which Federal statutes have subjected to Certificate requirements. The capital investments of certificated airlines, of motor carriers and of water carriers are represented largely by aircraft, busses, trucks and ships which can be shifted from one certificated route to another and which have a value independent of *any* certificated route. Railroads have an investment in fixed property, but a large proportion of total investment is in rolling stock, which can be shifted from route to route.

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*Certiorari has been sought and denied in two cases decided by Courts of Appeals dealing with problems arising under Section 7. *Panhandle Eastern Pipe Line Co. v. Federal Power Comm'n.* 219 F. 2d 729 (3d Cir.), *cert. denied*, 349 U. S. 945 (1955); *Panhandle Eastern Pipe Line Co. v. Federal Power Comm'n.* 169 F. 2d 881 (D. C. Cir.), *cert. denied*, 335 U. S. 854 (1948).

**See cases discussed pages 14 to 18, *infra*; *Texas & Pacific Ry. v. Gulf C. & S. F. Ry.*, 270 U. S. 266 (1926) (involved Certificate jurisdiction of I. C. C. under Part I of the Interstate Commerce Act (railroads), 24 Stat. 379, as amended, 49 U. S. C. §§ 1 *et seq.* (1952)); *F. C. C. v. RCA Communications, Inc.*, 346 U. S. 86 (1953) (involved license under the Federal Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. §§ 151-609 (1952)).

But interstate wholesale natural gas investment, represented by pipe lines, compressor stations and storage fields, is almost wholly immovable. Deprived of its certificated markets, its value may become negligible.

Moreover, the industry's concentration on a relatively few wholesale transactions renders it particularly vulnerable to Commission action transferring markets, or substantial portions of markets, from an original certificated supplier to a new supplier. This Court noted the effect of this individualized character of the industry on the rate regulatory scheme of the Natural Gas Act in *United Gas Pipe Line* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956). After pointing out that railroad regulation deals with a business comprising a "vast number of retail transactions", this Court said (at p. 339):

> ". . . On the other hand, only a relatively few wholesale transactions are regulated by the Natural Gas Act and these typically require substantial investment in capacity and facilities for the service of a particular distributor. . . ."

This economic fact is as relevant in determining what power the Natural Gas Act gave the Commission over Certificates as in determining what power it gave over fixing rates.

Even if a Federal commission should grant to a new applicant a Certificate to serve the identical route served by a previously certificated carrier by rail, water, highway or air, the commission would thereby merely give to the new and still leave with the old certificated carrier freedom to compete for the available "vast number of retail transactions" in passengers and in the wide variety of commodities transportable by freight.

Only in the interstate wholesale natural gas industry are facilities certificated for the sale of a single commodity to

particular specified customers.* Only in that industry can the Commission's grant of a Certificate to a new supplier (or as in the instant case the Commission's order directing a new supplier) to furnish a specified volume of gas to a particular customer operate directly and definitively to divest the original supplier of a corresponding volume of its business.

The measure of legal protection accorded holders of Certificates has an important bearing on many phases of the interstate natural gas industry. For example, in reviewing "rate of return" adjudications, this Court has indicated approval of a finding by the Commission that a natural gas company had "protected established markets" (*Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 604-05 (1944)). See also *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, 324 U. S. 635, 650 (1945) (natural gas company's business is "exceptionally free from serious business hazards. . . ."). Furthermore, investors in the natural gas industry have been operating under the assumption that the issuance of a Certificate protects such company from "unexpected and ruinous competition to serve the same market".**

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*The Commission issues Certificates to construct facilities only after hearing and proof, in great particularity, of the requirements of the markets to be served by the facility and the gas reserves available to meet those requirements, as well as the requirements of all other customers of the applicant (or if the applicant is a part of a larger system, the requirements of all customers and the availability of all reserves of the entire system). See 18 C. F. R. § 157.14 (11) (1949 ed) indicating the particularity with which market requirements must be shown and 18 C. F. R. § 157.14 (10) (1949 ed) as to the required showing concerning gas reserves.

**"A certificate of public convenience and necessity from the Federal Power Commission to construct a natural gas pipe line between certain points has provided, and will continue to provide you and your investors with good assurance that the project is feasible and that *you will not be confronted with unexpected and ruinous competition to serve the same market.* . . ." [Emphasis

The *legal* protection to be accorded the holders of Certificates under the Natural Gas Act (and thereby the protection to be accorded to investors who provide the funds for construction pursuant to such Certificates) is accordingly of substantial national importance.

2. The Court of Appeals has decided a Federal question in conflict with applicable decisions of this Court.

As stated above, there has been no decision by this Court dealing with Certificates under the Natural Gas Act. However, to the extent that decisions relating to Certificates under other acts express applicable principles of law and statutory interpretation, the decision in the instant case conflicts with applicable decisions of this Court.

In *United States* v. *Seatrain Lines*, 329 U. S. 424 (1947), this Court held that, absent specific statutory power, the Interstate Commerce Commission could not revoke or modify a Certificate theretofore granted to a water carrier. In *Federal Communications Commission* v. *National Broadcasting Co.*, 319 U. S. 239 (1943), this Court held that the grant of a license application which would impair the quality and scope of an existing license constituted a modification of the existing license, even though the commission did not purport to affect the existing license.* Thus, in the instant case, as in

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added] (Address by Jerome K. Kuykendall, Chairman, Federal Power Commission, before the Annual Convention of the American Gas Association, October 26, 1953.)

*This Court's holding in the *NBC* case has been twice followed. In *Wilson* v. *Federal Communications Comm'n.*, 170 F. 2d 793, 798-799 (D. C. Cir. 1948), the Court of Appeals, in reversing the F. C. C. for failure to hold the statutory hearing required for "modification", held there had been a "controlling judicial construction" by this Court that "modification" may occur not only directly by virtue of a literal change in terms but indirectly through grant of a license to another station. In *Democrat Printing Co.* v. *Federal Communications Comm'n.*, 202 F. 2d 298, 300 (D. C. Cir. 1952), the Court of Appeals,

the *NBC* case, the action of the Commission has impaired the quality and scope of Home's Certificates even if in form it did not purport explicitly to modify them. Under the *NBC* case, such action clearly constitutes a modification of Home's Certificates, which modification, under the *Seatrain* case, was not within the power of the Commission since the Natural Gas Act grants the Commission no power to revoke or modify a Certificate. The legislative history of the Act shows clearly that no such power to revoke or modify was intended.*

In another way, which does not expressly involve the concept of indirect "modification", this Court's decisions have indicated—without an express holding to that effect—that where a certificated company is rendering adequate service, a regulatory commission may not certificate a second company so as to deprive the first company of its existing service.**

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in reversing the F. C. C. for failure to make adequate statutory findings to support a "modification", said (citing this Court's *NBC* decision) that there was no question but that a second station's interference is "in fact and in legal effect a modification" of a prior license. Cf. *Black Hawk Motor Transit Co.* v. *Ill. Commerce Commission*, 398 Ill. 542, 76 N. E. 2d 478 (1947).

*The Certificate provisions of this Act were deliberately patterned after those of the Motor Carrier Act but omitted the revocation and modification provisions contained in the latter Act. (Hearings before the House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess., on H. R. 5249, July 10 and 11, 1941, p. 5).

**This view, in one form or the other, has been adopted by statutes of many states (*e.g.*, Ariz. Code Anno. § 66-506 (1939), *Whitfield Transp.* v. *Tucson Warehouse & Transf. Co.*, 78 Ariz. 136, 276 P. 2d 954 (1954); N. C. Gen. Stat. § 62-121.52(7) (1950); N. D. Rev. Code of 1943, § 49-1814; *Re Theel Bros. Rapid Transit Co.* v. *Great Northern Ry.*, 72 N. D. 280, 6 N. W. 2d 560 (1942); Ore. Rev. Stat. § 757.060(2) (1955)), and by judicial decisions in many others (*e.g.*, *Chicago, R. I. & P. Ry.* v. *Ill. Comm. Com'n*, 414 Ill. 134, 111 N. E. 2d 136 (1953); *Lorain-Amherst Transit* v. *P. U. C. O.*, 147 Ohio St. 376, 71 N. E. 2d 705 (1947); *Tri State Transit Co.* v. *Dixie Greyhound Lines*, 197 Miss. 37, 19 So. 2d 441 (1944)). For the economic justification of this rule, see, *e.g.*, Barnes, *The Economics of Public Utility Regulation*, 231-32, 755 (1942).

In *Interstate Commerce Comm'n* v. *Parker*, 326 U. S. 60, 74 (1945), construing the Motor Carrier Act*, Mr. Justice Douglas, dissenting, with Justices Black and Rutledge joining in such dissent, made the following statement:

> ". . . For if any applicant other than a railroad affiliate were before the Commission with an application for a certificate to serve this precise territory, *it would have to show that existing transportation facilities were inadequate to serve the needs of the public efficiently. . . .*" [Emphasis added]

The majority opinion indicated that the point made by the dissenting Justices was not in issue in the case, holding (at pp. 69-70):

> ". . . In protestants' view a certificate of convenience and necessity should not be granted to railroads for motor truck operation when existing motor carriers are capable of rendering the same service. Appellants take the position that this precise issue need not be decided in this case. They look upon the application as asking for authority to improve 'an existing service.' We think that it was for a motor service to improve an existing rail service. Consequently, the issuance of the certificate is subject to all the requirements of any other application for a certificate for operation of motor lines. *Since, however, on adequate evidence the Commission found that the motor service sought was of a different character from the existing motor service and not directly competitive or unduly prejudicial to the already certificated motor carriers*, 42 M.C.C. 725-26, *we hold that the Commission had statutory authority and administrative discretion to order* the certificate to issue. . . ." [Emphasis added]

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*Interstate Commerce Act, Part II, 49 Stat. 543, as amended, 49 U. S. C. §§ 301-327 (1952).

The emphasized portion of the quotation clearly implies that, *but for* the finding that the service was "not directly competitive or unduly prejudicial", the commission lacked power to grant the certificate.*

In *United States* v. *Detroit Navigation Co.*, 326 U. S. 236 (1945), in affirming the grant of a Certificate to operate as a common carrier by water,** this Court noted that no such service was then being rendered, that the case was "not one where there is service being presently rendered and a newcomer seeking entry into the field", that the service which had been rendered at a prior date had been inadequate and that such inadequacy was relevant to the determination of public convenience and necessity. To the same effect is *Luckenbach S. S. Co.* v. *U. S.*, 122 F. Supp. 824, *aff'd per curiam without opinion*, 347 U. S. 984 (1954).

The foregoing decisions of this Court affirmed the issuance of a second Certificate, relying heavily on the fact that service by the first Certificate holder was inadequate. The implicit corollary—that if the existing Certificate holder *was* rendering adequate service the commission could not issue the second Certificate—is the direct holding of the Court of Appeals under the Federal Communications Act in *Tri-State Broadcasting Co., Inc.* v. *Federal Communications Comm'n.*, 96 F. 2d 564 (D. C. Cir. 1938). There an application was made for a new broadcasting license in a city already served by other stations. The commission made findings as to the size of the area served, the extent of industry there and the extent of the present radio serv-

*In considering these carrier cases, there should at the same time be borne in mind the distinction (to which we have already adverted) between the economics underlying carrier Certificates and the economics underlying natural gas Certificates. See the discussion of this point at pages 11 and 12, above.

**Under the Water Carrier Act, Interstate Commerce Act, Part III, 54 Stat. 929, as amended, 49 U. S. C. §§ 901-923 (1952).

ice. Upon these specific factual findings the commission based its ultimate finding that the public interest, convenience and necessity would be served by the grant of an additional license. The Court of Appeals reversed, holding that before issuing a license to another station, *the commission must find that the present radio service was inadequate and that the licensing of an additional station was required by the public convenience and necessity.*

In the instant case, the court below held that three prior decisions by Courts of Appeal were "dispositive" of the point involved. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n,* 219 F. 2d 729 (3d Cir.), *cert. denied,* 349 U. S. 945 (1955); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n,* 169 F. 2d 881 (D. C. Cir.), *cert. denied,* 335 U. S. 854 (1948); *Kentucky Natural Gas Corp.* v. *Federal Power Comm'n,* 159 F. 2d 215 (6th Cir. 1947).

The two *Panhandle Eastern* cases dealt with a new service which would not be in displacement of the service of the previously certificated supplier, as is apparent from the very quotations which the Court below made from the opinions (Appendix A, pages *27* and *28*). Furthermore, in the earlier of the two *Panhandle Eastern* cases, the Commission had granted the competitive certificate to Michigan-Wisconsin Pipe Line Company which Panhandle Eastern opposed, but with express protective provisions giving Panhandle Eastern the right to participate in the future growth of the Detroit-Ann Arbor market. The *Kentucky Natural* case dealt with rival applications, one by the original supplier and one by the distributing company itself, each seeking to build the same facilities to bring gas from the same source of supply (a long distance pipe line from the Southwest) to the distributing company's system, which could not be adequately served from the original supplier's existing system.

These decisions could not be "dispositive" of the question of the Commission's legal power to *displace* an existing adequate service.

In the instant case, the Commission regarded Section 7(g) of the Natural Gas Act as granting it the unlimited power which it claims (J. App. 94a). That Section provides:

> "(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company." [56 Stat. 84 (1942); 15 U. S. C. § 717f (g) (1952)]

But plainly this is not an affirmative grant of power (which could easily have been expressed affirmatively); it merely negatives any implied limitation, which might be found elsewhere in Section 7, on the Commission's power to grant Certificates for service of an *"area"* already being served by a natural gas company.

The word "area" occurs in subdivisions (c), (f) and (g) of Section 7, and only in those subdivisions.* Subdivision (c) authorizes the issue of a "grandfather" Certificate for operation within the *"area"* in which a company previously operated; subdivision (f) authorizes the Commission to determine the "service *area*" within which a company may extend its facilities without further authorization; subdivision (g) immediately following, provides that nothing in the section shall be construed as a limitation on the Commission's power to grant Certificates "for service of an *area* already being served".

Not being an affirmative grant, but the rebuttal of a possible inference, subdivision (g) leaves where it is—

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*Added to the Act on February 7, 1942, by Public Law No. 444, 77th Cong., 2d Sess., 56 Stat. 83, 84. Subdivision (c) was substituted for a preexisting subdivision (c) which had not used the word "area".

without enlargement or diminution—the Commission's legal power to grant a second Certificate. There remain the questions whether it has power to grant such a Certificate if it will result in an indirect modification of a prior Certificate and whether it has power to grant it absent a finding of inadequate service by the holder of a prior Certificate.

Since subdivision (g) neither enlarges nor diminishes the Commission's power to grant a Certificate—and in terms it deals only with the grant of Certificates—*a fortiori* it cannot give the Commission power merely by order to direct a second supplier to render a displacing service.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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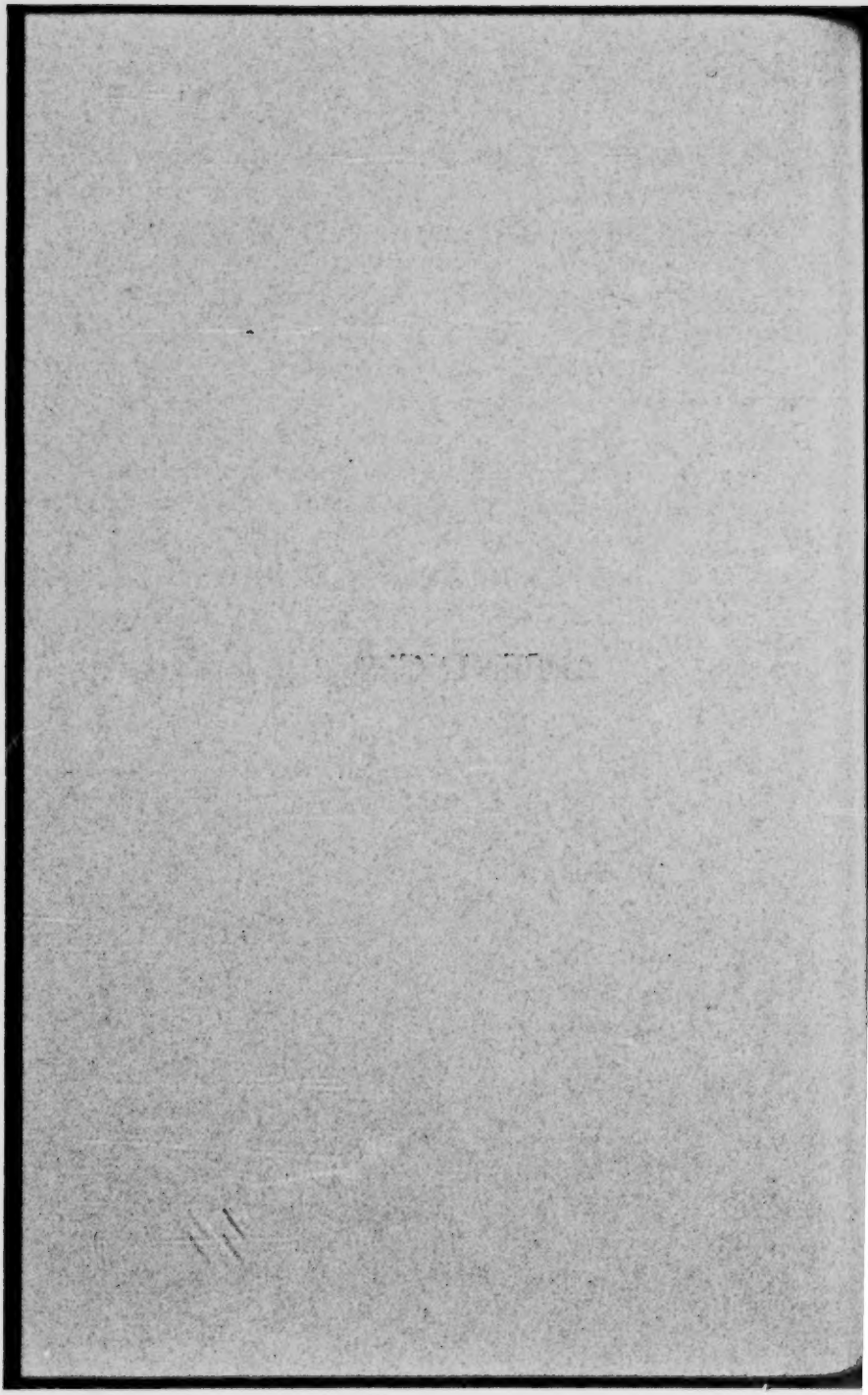
APPENDICES



Appendix A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,726

HOME GAS COMPANY and THE MANUFACTURERS LIGHT AND HEAT COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, CENTRAL HUDSON GAS AND ELECTRIC CORPORATION, and ROCKLAND LIGHT AND POWER COMPANY, RESPONDENTS

On Joint Petition for Review of Orders of the Federal Power Commission

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Decided March 15, 1956

Mr. Edward S. Pinney, with whom *Mr. John Peyton Randolph* was on the brief, for petitioners. *Mr. E. Fontaine Brown* also entered an appearance for petitioners.

Mr. William C. Levy, Attorney, Federal Power Commission, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Willard W. Gatchell*, General Counsel, Federal Power Commission, and *William J. Grove*, Assistant General Counsel, Federal Power Commission, were on the brief, for respondent, Federal Power Commission.

Mr. Morrell S. Lockhart, with whom *Messrs. Justin R. Wolf* and *Theodore J. Carlson* were on the brief, for respondent, Central Hudson Gas and Electric Corporation.

Appendix A

Mr. Justin R. Wolf, with whom *Mrs. Louise C. Powell* was on the brief, for respondent, Rockland Light and Power Company.

Before EDGERTON, Chief Judge, and DANAHER and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge*: This case is before the court on a joint petition by the Home Gas Company and The Manufacturers Light and Heat Company for review, under Section 19 (b) of the Natural Gas Act,[1] of orders of the Federal Power Commission issued February 11, 1955, and April 4, 1955, as amended May 9, 1955, which orders directed Tennessee Gas Transmission Corporation to make connections and serve gas to Rockland Light and Power Company and Central Hudson Gas and Electric Corporation. Home and Manufacturers are wholly owned subsidiaries of The Columbia Gas System, Inc.

There is also before the court a petition under Section 19 (b) which asks this court to direct the Commission to take additional testimony.

Home and Manufacturers are natural gas companies. Home supplies natural gas to Rockland and Central Hudson which it obtains from Manufacturers, its sole supplier. Rockland and Central Hudson sell gas on a retail basis to the ultimate consumer. Rockland is engaged in the distribution of natural gas in a number of communities in Orange and Rockland Counties, New York, the territories served being in rapidly growing sections of the New York City metropolitan area. Central Hudson is a

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[1] 52 Stat. 821, as amended by 56 Stat. 83; 15 U. S. C. § 717.

Appendix A

New York corporation engaged in distributing gas and electricity in the Hudson River Valley, an area already fundamentally changed by way of increased population due to the recently completed New York State Thruway.

In the matter of Iroquois Gas Corporation and Tennessee Gas Transmission Corporation, Docket Nos. 2310, etc. of the Federal Power Commission, Tennessee sought approval for a major expansion of its facilities into the Greater New York market, then served by Transcontinental Gas Pipeline Corporation solely. Transcontinental filed a competing application, in which it proposed to render the same or similar service in the same area, to the exclusion of Tennessee. It was in this proceeding that Rockland and Central Hudson sought and were granted permission to intervene, urging that any order authorizing Tennessee's entry into the Greater New York area be conditioned upon the requirement that Tennessee make available an additional firm supply of natural gas to Rockland and Central Hudson.

On December 28, 1954, the Commission disposed of all issues having to do with the applications of Tennessee and Transcontinental, except that it deferred decision on the issues presented by Rockland and Central Hudson until after oral argument thereon. Thereafter oral argument was had and on February 11, 1955, the Commission issued the following findings:

"(1) Tennessee Gas Transmission Company, a Delaware corporation, is a 'natural-gas company' within the meaning of the Natural Gas Act and subject to the jurisdiction of the Commission as heretofore found.

"(2) Tennessee is able and willing properly to do the acts and to perform the service proposed, and to conform to the provisions of the Natural Gas Act and the requirements, rules and regulations of the Commission thereunder.

"(3) Rockland Light and Power Company is engaged in the local distribution of natural gas in the State of New York.

"(4) Central Hudson Gas & Electric Corporation is engaged in the local distribution of natural gas in the State of New York.

"(5) The physical interconnections of facilities and the services hereinafter ordered to be provided by Tennessee to Rockland and Central Hudson are necessary and desirable in the public interest, and will place no undue burden upon Tennessee. Such interconnections and sales will not require the enlargement of Tennessee's facilities, nor will they impair Tennessee's ability to render adequate service to its existing and authorized customers.

"(6) Public convenience and necessity requires that the service to be rendered by Tennessee be limited as hereinafter ordered and conditioned."

The Commission also issued the following order:

"(A) Tennessee be and it is hereby directed to construct necessary interconnections of its transportation facilities with the proposed or existing facilities of Rockland and Central Hudson and deliver and sell volumes of natural gas not in excess of 5,000 Mcf per day or 1,287,000 Mcf per year for the period December 1, 1955 to December 1, 1957, and not in excess of 7,000 Mcf per day or 1,800,000 Mcf per year thereafter to Rockland; and not in excess of 4,500 Mcf per day or 1,100,000 Mcf per year

for the period December 1, 1955 to December 1, 1957 and not in excess of 6,500 Mcf per day and 1,600,000 Mcf per year thereafter to Central Hudson, under appropriate rate schedules, *Provided, however*, that if Rockland and Central Hudson shall not have constructed, by December 1, 1955, the facilities necessary to enable them to accept deliveries from Tennessee as herein directed, then Tennessee shall be relieved of the duty to render the service herein ordered."

Thereupon a joint application and petition of Home, Manufacturers, United Fuel Gas Company and Ohio Fuel Gas Company was filed for reconsideration and vacation or for rehearing of the February 11, 1955 order, and for a stay of said order pending a final determination of the issues. Thereafter the order of April 4, 1955, as amended May 9, 1955, denying the petition for rehearing was filed.

Following this, the petition for review in this case was filed by Home and Manufacturers, United and Ohio not being parties thereto.

Petitioners allege that they are aggrieved by the Commission's orders. Initially, petitioners point out that the instant orders will result in an economic loss to them of substantial revenues during 1956 and the ensuing years. Petitioners contend that, with the initiation of purchases of gas by intervenors from Tennessee, the sales of petitioners to intervenors will be reduced. To what degree and whether this reduction will amount to a substantial loss of revenues to petitioners is another question.[2] In

[2]The tremendous growth in residential and industrial expansion of the territories now being served by intervenors is such that intervenors anticipate that their gas requirements will double within the next five years.

balancing the equities from an economic standpoint, it would appear that both intervenors, Rockland and Central Hudson, will benefit from the availability of gas from Tennessee for a portion of their gas supply. The Commission directed its attention to the problem of the economic values and, in its order of February 11, 1955, set out in exact amounts the gas to be supplied by Tennessee to intervenors. We find this problem again considered in the order denying rehearing issued April 4, 1955, wherein the Commission ruled:

> "The Columbia Intervenors' major complaint is that they will suffer a loss of profits and will have idle capacity if Central Hudson and Rockland are authorized to receive service from Tennessee. In our order of February 11, 1955,[3] we limited the services by Tennessee to preclude any such injury to Home. The testimony offered by Home suggests the possibility of loss of anticipated future profits, but there is no basis in the record for concluding that under Home's present rates, Home's sales will deteriorate with the authorized service to a point where Home's return is inadequate. On the contrary, it is clear from the record that both demand billing units and total annual sales will continue above the level on which Home's present rates are based."

There is also to be considered the factor of the public interest. We find substantial evidence in the record to support the contention that the private consumer will benefit by intervenors' purchase of gas from Tennessee. Not only is there the possibility that the individual consumer will be able to buy gas at a cheaper rate per Mcf

[3]In the Joint Appendix this date appears: "February 4, 1955."

but the Tennessee connection at the northern end of intervenors' extensive pipeline system will provide protection against failure of gas supply due to a line break[4] or other emergencies affecting Home's line and intervenors' own distribution facilities. Furthermore, Tennessee's added service as a second source of supply will render unnecessary the looping of Rockland's existing 6-inch feeder main to Orangeburg, New York, and permit, in addition, the development of markets in Central Hudson's northern territory. Of course, this creates an advantage to the intervenors but, again more important, the ultimate benefit will be enjoyed by the individual consumer, thus inuring to the public interest.

Petitioners allege that the Commission's orders deprive them (petitioners) of rights which were granted by certificates of public convenience and necessity issued by the Commission pursuant to Section 7 (c) of the Act. In this connection we direct attention to *Panhandle Eastern Pipe Line Co.* v. *FPC*, 219 F.2d 729, 731 (3d Cir. 1955), cert. denied, May 31, 1955, No. 737, where the court points out:

> "Whatever may be the outcome of Panhandle's effort to obtain authority for reduction of its supply of gas to Michigan Consolidated, the gas to be delivered to that concern by American Louisiana is not in displacement of any part of its Panhandle allotment but over and above it in order to provide for the increased requirements of the Michigan consolidated territory."

[4]Due to the number of river crossings, this is important as these breaks are difficult to repair, particularly during the winter months when the rivers may be covered with ice.

Appendix A

That the petitioners have not been deprived of any rights granted them in certificates of public convenience and necessity heretofore issued by the Commission is evident from a reading of *Panhandle Eastern Pipe Line Co.* v. *FPC*, 83 U.S.App.D.C. 297, 169 F.2d 881, cert. denied, 335 U.S. 854 (1948), where, under a similar set of circumstances, the court said (169 F.2d, at 883, 884):

> "The Commission rightly took into account the interests of other communities now served by Panhandle and of still others that will be served by Michigan-Wisconsin. Even apart from such interests, nothing in the Natural Gas Act suggests that Congress thought monopoly better than competition or one source of supply better than two, or intended for any reason to give an existing supplier of natural gas for distribution in a particular community the privilege of furnishing an increased supply."

Again, in the Kentucky Natural Gas case (*Kentucky Natural Gas Corp.* v. *FPC*, 159 F.2d 215 (6th Cir. 1947), it was pointed out, at page 218:

> "Its chief contention in attempting to meet this burden is that it has been satisfactorily supplying this territory since 1932 by obtaining natural gas from Panhandle and delivering it to Central Illinois through its own facilities at a point on the Indiana-Illinois state line, and that while Central Illinois has been earning a fair return on its rate base, Kentucky Natural has been operating at a loss for many years and its ability to render adequate service at reasonable rates in its remaining area would be jeopardized by the loss of its sales to Central Illinois. But a right to continue to exclusively serve the Mattoon area is not granted to it by the Natural Gas Act. On the

contrary, § 717f(g), Title 15 U.S.C.A. appears to specifically recognize the right of the Federal Power Commission to issue a certificate of public convenience and necessity to a competitor, by providing 'Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural gas company.'"

While we think these cases dispositive of the present appeal, there is one further point which we feel obliged to discuss. Petitioners contend that, assuming the Commission has power under the Act (15 U.S.C. §§ 717 f (a), (c) and (g) to grant a certificate of public convenience and necessity to a second supplier for service to an area already being served, the Commission has no power to require such service by order pursuant to § 717 f (a), which reads:

"Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have

> no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers."

To uphold petitioners' contentions would in effect force us to consider the above noted sections as being mutually exclusive. This we cannot do. Indeed, we find them complementary. No basis exists in the legislative history of the Act, and certainly none in the plain language of the text, for the creation of a third limitation on § 717 f (a), as petitioners urge, namely, where the area involved is already being served by a natural gas company. Cf. *Manufacturers Light & Heat Co.* v. *FPC*, 206 F.2d 404 (3d Cir. 1953).

With respect to petitioners' final contention, i.e., that Tennessee is not able and willing to provide the proposed service, we find no merit in this claim. It appears that while before the Commission Tennessee stated that it sells gas to Home's affiliates and that it was contrary to the policy of Tennessee to contract voluntarily with the customer of one of its (Tennessee's) customers, nevertheless Tennessee admitted that it has capacity to supply Rockland and Central Hudson and that, if directed to supply them, it would do so. Tennessee has not appealed.

The motion of petitioners to adduce further testimony is denied.

The Commission's orders on review are

Affirmed.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1956.

HOME GAS COMPANY and THE MANUFACTURERS LIGHT AND HEAT COMPANY, *Petitioners,* *v.* FEDERAL POWER COMMISSION, CENTRAL HUDSON GAS AND ELECTRIC CORPORATION, and ROCKLAND LIGHT AND POWER COMPANY, *Respondents.*	No. 12726

On Joint Petition for Review of Orders of the Federal Power Commission.

Before: Edgerton, Chief Judge, and Danaher and Bastian, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the orders of the said Federal Power Commission on review herein be, and the same are hereby, affirmed.

Dated: March 15, 1956.

Per Circuit Judge Bastian.

Appendix C

NATURAL GAS ACT

(52 Stat. 821-833 (1938), as amended, 56 Stat. 83-84 (1942), 61 Stat. 459 (1947), Title 15 U. S. C. App. §§ 717-717w (1952).

* * *

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U. S. C. 717f (a) (1952)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Com-

mission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U. S. C. 717f (b) (1952)]

(c)* No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

*Subsection 7 (c) was amended February 7, 1942 by Public Law No. 444, 77th Congress, 2d Session [H. R. 5249], 56 Stat. 83.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f (c) (1952)].*

* * *

*As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, 3d Session [H. R. 6586], 52 Stat. 825, Section 7 (c) read as follows:

> "(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however,* That a natural-gas company already serving a market may enlarge or extend its facilites for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for

(e)* Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f (e) (1952)]

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a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))

*Subsection 7 (e) was added February 7, 1942 by Public Law No. 444, 77th Congress, 2d Session [H. R. 5249], 56 Stat. 83, 84.

(f)* The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization. [56 Stat. 84 (1942); 15 U. S. C. § 717f (f) (1952)]

(g)** Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company. [56 Stat. 84 (1942); 15 U. S. C. § 717f(g) (1952)]

* * *

*Subsection 7 (f) was added February 7, 1942 by Public Law No. 444, 77th Congress, 2d Session [H. R. 5249], 56 Stat. 83, 84.

**Subsection 7 (g) was added February 7, 1942 by Public Law No. 444, 77th Congress, 2d Session [H. R. 5249], 56 Stat. 83, 84.

Appendix D

ARITHMETICAL ERROR IN ORDER DENYING REHEARING

The Order Denying Rehearing (J. App. 94a-103a) contains a number of arithmetical errors, one of which is extremely prejudicial to an accurate understanding of Petitioners' case. It is necessary that such errors be arithmetically corrected in order to show that the displacement of Home's sales to Central Hudson will continue for the foreseeable future. The Commission's erroneous figures for 1957 and 1958 would indicate that this is not the case.

The Commission's tabulation showing annual sales of Home to Central Hudson, after giving effect to the Tennessee sales ordered by the Commission, substantially overstates Home's sales for 1957 and 1958.

The Commission's tabulation is (J. App. 101a):

	Annual Sales (Mcf)			
	1955	1956	1957	1958
Central Hudson	2,211,000	1,281,000	2,450,000	1,617,000

The corrected tabulation is:

Central Hudson	2,211,000	1,281,000	1,450,000	1,115,000

The Commission's 2,450,000 Mcf figure for 1957, by its obvious discrepancy with the figures for the preceding and succeeding years, indicates an arithmetical error. The arithmetical errors for both 1957 and 1958 are apparent from other figures on the face of the Commission's Order directing the sales by Tennessee. The Commission's tabulation (J. App. 48a) showing Central Hudson's *proposal* for

meeting its annual requirements shows the following for the years 1955 through 1958:

(Mcf)

Annual	Requirements 1955	1956	1957	1958
Home	2,138,000	347,000	354,000	440,000
Tennessee	—	2,034,000	2,196,000	2,275,000
Produced	73,000			2,000

In its Order the Commission adjusted downward the Tennessee deliveries from those proposed by Central Hudson, limiting them to 1,100,000 Mcf for the years 1956 and 1957, and 1,600,000 for 1958 and subsequent years. Therefore, in order to show (in its tabulation, J. App. 101a) the effect of its Order on the volumes to be delivered by Home, the Commission had to adjust upward the Home volumes given above to compensate for the downward adjustment of the Tennessee volumes. In making this adjustment, the Commission's arithmetic for the year 1956 is correct; its arithmetic for the years 1957 and 1958 is obviously erroneous: For the year 1956, Central Hudson is to receive from Tennessee 1,100,000 Mcf rather than the requested 2,034,000 Mcf. The difference between these two amounts, *viz.*, 934,000 Mcf, must be supplied by Home, and therefore the volume to be served by Home should be increased from 347,000 Mcf to 1,281,000 Mcf. Referring to the tabulation in the Order Denying Rehearing, this is the exact figure that is given for Home's sales to Central Hudson.

However, when the same adjustment is made to the 1957 volumes as contained in the Central Hudson proposal, it is clear that the corresponding figure for 1957 in the Order Denying Rehearing is incorrect:

Appendix D

	Mcf
Requested from Tennessee	2,196,000
Ordered by the Commission	1,100,000
Difference	1,096,000
Volume Central Hudson proposed to take from Home	354,000
Total required from Home	1,450,000

The correct figure for Home's deliveries in 1957 is 1,450,000 Mcf *not* 2,450,000 as shown by the Order Denying Rehearing.

The same adjustment can be made for the year 1958:

	Mcf
Requested from Tennessee	2,275,000
Ordered by the Commission	1,600,000
Difference	675,000
Volume Central Hudson proposed to take from Home	440,000
Total required from Home	1,115,000

The correct figure for Home's deliveries in 1958 is 1,115,000 Mcf *not* 1,617,000 as shown by the Order Denying Rehearing.

This recomputation, as well as the correction of other arithmetical errors appearing in the Order and Order Denying Rehearing, is more fully treated in Appendix D to "Petitioners' Reply to Respondents' Objections to Joint Petition for Leave to Adduce Additional Evidence Before the Federal Power Commission" filed with the Court below, November 26, 1955, and certified to this Court.

JUN 11 1956

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 160.

HOME GAS COMPANY and THE MANUFACTURERS LIGHT AND HEAT COMPANY,
Petitioners,

v.

FEDERAL POWER COMMISSION, CENTRAL HUDSON GAS & ELECTRIC CORPORATION and ROCKLAND LIGHT AND POWER COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT CENTRAL HUDSON GAS & ELECTRIC CORPORATION, IN OPPOSITION.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
The Statute Involved	2
Statement	2
Argument in Opposition to Allowance of Writ of Certiorari	6
I. There is no question of Federal law involved in this case which requires determination by this Court	6
II. There is no conflict of decisions among the Courts of Appeals	7
III. The order of the Court of Appeals is not in conflict with applicable decisions of this Court	8
Conclusion	11
Appendix A: A reproduction of Exhibit 159, Sheet 1, (R. 10836, J. App. 105a) being a map showing the transmission and distribution system of Central Hudson Gas & Electric Corporation, its connection with Home Gas Company and the proposed transmission line to connect with the northern line of Tennessee Gas Transmission Company	13

Index of Authorities.

Cases

PAGE

Arkansas-Louisiana Gas Co. v. *Federal Power Commission*, 113 F. 2d 281 (5th Cir. 1940) 7

Federal Communications Commission v. *National Broadcasting Co.*, 319 U. S. 239 10

Home Gas Co. v. *Federal Power Commission*, 231 F. 2d 253 (D. C. Cir. 1956) 4

Interstate Commerce Commission v. *Parker*, 326 U. S. 60 8

Kentucky Natural Gas Corp. v. *Federal Power Commission*, 159 F. 2d 215 (6th Cir. 1947) 7

Luckenbach Steamship Co. v. *United States*, 122 F. Supp. 824 (S. D. N. Y. 1954), aff'd *per curiam* 347 U. S. 984 8

Panhandle Eastern Pipe Line Co. v. *Federal Power Commission*, 169 F. 2d 881 (D. C. Cir. 1948), cert. denied 335 U. S. 854 ..... 6, 7

Tri-State Broadcasting Co. v. *Federal Communications Commission*, 96 F. 2d 564 (D. C. Cir. 1938) 10

Tri-State Boardcasting Co. v. *Federal Communications Commission*, 107 F. 2d 956 (D. C. Cir. 1939) 11

United States v. *Detroit and Cleveland Navigation Co.*, 326 U. S. 236 9

United States v. *Seatrain Lines*, 329 U. S. 424 10

Statutes

Natural Gas Act of 1938, c. 556, 52 Stat. 821, as amended, c. 49, 56 Stat. 83 (1942), c. 333, 61 Stat. 459 (1947), 15 U. S. C. Sec. 717 (1952)

Sec. 7(g) 6, 11

IN THE

Supreme Court of the United States

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT CENTRAL HUDSON GAS & ELECTRIC CORPORATION, IN OPPOSITION.

Opinions Below.

The Federal Power Commission's Order Directing Physical Connection of Facilities and Sales of Natural Gas, issued February 11, 1955 and its Order Denying Rehearing issued April 4, 1955, are unreported and are printed in the Joint Appendix at pages 40a-51a and 94a-103a.*

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* References to the Joint Appendix of the Parties before the Court below will be designated "J. App." and references to the record will be designated "R".

The opinion of the Court of Appeals is reported at 231 F. 2d 253 and is printed in Appendix A of Petition (pages 21 to 30). The judgment of the Court of Appeals is unreported and is printed in Appendix B of Petition (page 31).

Jurisdiction.

The judgment of the Court of Appeals for the District of Columbia Circuit (Appendix B to Petition, page 31) was entered on March 15, 1956. The petition for the writ of certiorari was filed on June 12, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Questions Presented.

Under the Natural Gas Act does the Federal Power Commission have the power to issue an order which will provide a second source of supply of natural gas to a distribution company which is receiving natural gas from another supplier?

The Statute Involved.

This case arises under the Natural Gas Act, 52 Stat. 821 (1938) as amended, 56 Stat. 83 (1942), 61 Stat. 459 (1947), 15 U. S. C. §§717-717w (1952). The Section of the Act here pertinent is Section 7, the applicable portions of which are set forth in Appendix C of Petition.

Statement.

Central Hudson Gas & Electric Corporation (hereinafter called Central Hudson) is a New York corporation engaged in the business of distributing gas and electricity to consumers in the Hudson River Valley. It distributes natural gas at retail to consumers in the Cities of Pough-

keepsie and Beacon in Dutchess County, Newburgh in Orange County and Kingston in Ulster County and in certain towns and villages located in Dutchess, Orange and Ulster Counties, all in the State of New York. The United States Military Academy at West Point, New York and Stewart Air Base near Newburgh are also supplied with natural gas by Central Hudson.

Central Hudson presently receives its entire supply of natural gas from petitioner, Home Gas Company (hereinafter called Home) through a connection with a single pipe transmission line of Home at the southern end of the Central Hudson territory. The transmission and distribution system of Central Hudson as presently constructed, its connection with Home and the proposed transmission line to connect with Tennessee Gas Transmission Company (hereinafter called Tennessee), are shown on the map which was received in evidence as Sheet 1, Exhibit 159 (R. 10836, J. App. 105a), a reproduction of which is attached hereto marked Appendix A. It will be seen from an examination of this map that the Central Hudson territory is an elongated area so that the single source of supply at the southern end is 70 miles from the northern extremity of the area now served. An interruption of supply would, therefore, deprive the entire Central Hudson system of natural gas. Its standby manufactured gas plants are now inadequate to supply its customers' entire requirements during the winter heating season.

In order to protect the continuity of service to its customers, extend the areas within its territory where gas is available, and reduce the cost of its gas supply, Central Hudson requested the Federal Power Commission to direct Tennessee to establish a physical connection of its transmission line running in an east-west direction north of the Central Hudson area with a line proposed to be

constructed by Central Hudson. (See map, Appendix A hereto.) The Federal Power Commission by its orders dated February 11, 1955 and April 4, 1955, found that such connection was necessary and desirable in the public interest and directed that such connection be made.

This connection, at the northern end of its territory, would give Central Hudson and its customers several advantages, and the Court of Appeals, in affirming the orders of the Federal Power Commission, summarized these advantages as follows: *Home Gas Company* v. *Federal Power Commission,* 231 F. 2d 253 at p. 256; Appendix A to Petition at pp. 26-27.

> "Not only is there the possibility that the individual consumer will be able to buy gas at a cheaper rate per Mcf. but the Tennessee connection at the northern end of intervenors' extensive pipeline system will provide protection against failure of gas supply due to a line break or other emergencies affecting Home's line and intervenors' own distribution facilities. Furthermore, Tennessee's added service as a second source of supply will render unnecessary the looping of Rockland's existing 6-inch feeder main to Orangeburg, New York, and permit, in addition, the development of markets in Central Hudson's northern territory. Of course, this creates an advantage to the intervenors but, again more important, the ultimate benefit will be enjoyed by the individual consumer, thus inuring to the public interest."

In 1949 Central Hudson entered into a service agreement providing for the supply of gas by Home of all of Central Hudson's requirements of natural gas for a period of 20 years pursuant to Home's tariff then in effect; and thereafter Central Hudson constructed a 40 mile line to connect with Home's line. However, in 1952 Home withdrew its tariff theretofore in effect under which it had undertaken to

supply Central Hudson's entire requirements of natural gas and substituted a contract demand form of tariff (R. 9656-9663, J. App. 426a-430a; R. 10936, J. App. 159a), under which Home is not bound to supply Central Hudson's requirements above its contract demand and the obligation of Central Hudson is limited to its contract demand. The parties have been operating under this contract demand arrangement since that time.

Central Hudson has in the past completely fulfilled its contractual obligations to Home and will continue to do so.

Petitioners refer to many certificates in their petition and in the record, which were granted prior to the connection made by Central Hudson. (R. 9608-9610, J. App. 402a-403a) The certificates which were granted to petitioners after that date were for the most part concerned with construction to improve service to the western portion of the Home system, which serves subsidiaries of The Columbia Gas System, Inc. but not Central Hudson. (R. 9544, J. App. 380a; R. 9612-9617, J. App. 405a-408a) The large investment required to bring service to the Central Hudson area was made by Central Hudson, not by petitioners. (R. 3686-3687, J. App. 196a-197a) The line of Home which Central Hudson tapped and the Coatesville-Port Jervis line of Manufacturers were both certificated prior to the date of the service agreement (R. 9608, *et seq.*, J. App. 402a, *et seq.*) between Central Hudson and Home. The only facilities which Home was required to construct specifically to serve Central Hudson consisted of a meter and regulator station costing approximately $18,000 and involving direct operating cost of only about $15 a month. (R. 9610, *et seq.*, J. App. 403a, *et seq.*)

In comparison, Central Hudson made an investment of approximately $1,850,000. Thus, the Central Hudson business came to Home with very little expenditure by Home.

ARGUMENT.

I.

There is no question of Federal law involved in this case which requires determination by this Court.

The Natural Gas Act clearly confers upon the Federal Power Commission discretionary power to grant a certificate for service to an area already being served by another natural gas company.

Section 7(g) of the Natural Gas Act provides:

> "(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural gas company." (56 Stat. 84 (1942)); 15 U. S. C. §717f (g) (1952)

This Court has denied an application for a writ of certiorari to review affirmance by the Court of Appeals of orders of the Federal Power Commission granting a certificate to serve an area already served by another company.

> *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 169 F. 2d 881 (D. C. Cir. 1948), cert. denied 335 U. S. 854.

The suggestion by petitioners that there is a limitation on the power of the Commission to grant a competing certificate if the result of such certificate will be a reduction in the volume of gas currently supplied by the first supplier is without basis in the Act. The extent of the legal limitation which the Commission must observe in granting a certificate to a second supplier, is that it must find that its action is necessary or desirable in the public interest.

A determination of the public interest may involve, in the Commission's discretion, a limitation in the second certificate for the protection of the first supplier; and the Commission, in this case, has attached conditions in its orders for the protection of Home. The nature and the extent of these conditions are to be determined by the Commission as the public convenience and necessity may require. To say that the Commission cannot, as a matter of law, grant a certificate for the service of an area already being served by a natural gas company, unless the existing service is not modified in any way, is to violate the plain meaning of the statute and to grant a monopoly where such a result is specifically negatived by the statute.

For these reasons, it appears that there is no question of Federal law to be settled.

II.

There is no conflict of decisions among the Courts of Appeals.

Similar contentions that the Federal Power Commission has no power to permit service to an area already being served by another company have been disposed by the Courts of Appeals of three circuits. In each of these cases, the power of the Federal Power Commission to permit such service has been upheld.

> *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F. 2d 881 (D. C. Cir. 1948), cert. denied 335 U. S. 854;
> *Kentucky Natural Gas Corp.* v. *Federal Power Commission*, 159 F. 2d 215 (6th Cir. 1947);
> *Arkansas-Louisiana Gas Co.* v. *Federal Power Commission*, 113 F. 2d 281 (5th Cir. 1940).

There is no case to the contrary.

III.

The order of the Court of Appeals is not in conflict with applicable decisions of this Court.

The Petitioner cites several cases in this Court with which it claims the decision below is in conflict. In fact such prior decisions of this Court as are applicable fully support the decision below.

In *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60, this Court reinstated an order of the Interstate Commerce Commission which had been reversed by the lower court. The principal ground upon which the decision of this Court was predicated was stated at page 65:

> "The Commission had assumed, as its duty under these earlier sub-sections, the finding of facts and exercise of its judgment to determine public convenience and necessity. This court approved this construction. . . . The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. . . . This, of course, gives administrative discretion to the Commission, . . . to draw its conclusion from the infinite variety of circumstances which may occur in specific instances."*

In *Luckenbach Steamship Co.* v. *United States,* 122 F. Supp. 824 (S. D. N. Y. 1954) aff'd *per curiam* 347 U. S. 984, this Court affirmed without opinion a decision of the lower court upholding the right of the Interstate Commerce Commission to grant a certificate of public convenience and necessity to a competing carrier even though such grant would have an adverse effect upon the existing

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* The omissions in the quotations set forth in this section are citations of cases.

carrier. This is clear from the decision of the court below. At page 828 the court said:

> "A decrease in revenue or sharing of existing tonnage will not of itself defeat an application where, as here, it is shown that the proposed service will serve the needs of the public, and the transportation system, then the application may be granted. . . . Moreover, it is for the Commission to decide whether the granting of the certificate in such a case is in the public interest."

The court held that it was only incumbent upon the Commission to give consideration to the effect of the order of the Commission upon existing carriers. Since it had done so, its discretion to issue the certificate was upheld even though the Commission itself had found that the issuance of such a certificate would occasion a loss of traffic to existing carriers. In the case at bar the Commission considered the effect of its order upon the petitioners herein and found that the public convenience and necessity required that the service to be rendered by Tennessee should be limited for the benefit of Home as prescribed in its order.

In *United States* v. *Detroit and Cleveland Navigation Co.*, 326 U. S. 236, this Court reinstated an order of the Interstate Commerce Commission granting certificates of convenience and necessity after the lower court had set aside such order. This court said, at pages 240, 241:

> "If the Commission were required to deny these applications unless it found an actual inability on the part of existing carriers to acquire the facilities necessary for future transportation needs, a limitation would be imposed on the power of the Commission which is not found in the Act. The Commission is the guardian of the public interest in determining

> whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. . . . Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies."

In each of these cases therefore this Court sustained the discretion of the Commission.

The case of *Federal Communications Commission* v. *The National Broadcasting Co.*, 319 U. S. 239, involved only the question as to whether an existing broadcaster had a right to be heard before the Commission where the Commission's order might affect its rights. In the case at Bar the petitioners herein participated fully in all proceedings before the Commission and the court below.

The case of *United States* v. *Seatrain Lines*, 329 U. S. 424 did not involve the right of the Interstate Commerce Commission to grant a certificate of public convenience and necessity, but its right to revoke or limit such a certificate previously granted. There is nothing in that case which suggests that the Commission could not, in a proper case, have granted an additional certificate to a competitor if it found that the public convenience and necessity would be served thereby.

The case of *Tri-State Broadcasting Co.* v. *Federal Communications Commission*, 96 F. 2nd 564 (D. C. Cir. 1938) did not involve a determination of the right of the Commission to grant a certificate. It was concerned only with the question whether or not the Commission's order was based upon sufficient evidence. The case was remanded to the Commission for further proceedings. After further

proceedings, the Commission granted the second certificate, and its order was affirmed by the Court of Appeals. *Tri-State Broadcasting Co.* v. *Federal Communications Commission,* 107 F. 2d 956 (D. C. Cir. 1939).

It should also be noted that none of the foregoing cases arose under the Natural Gas Act and that the statutes under which such cases did arise did not contain a provision such as Section 7(g) of the Natural Gas Act, specifically retaining for the Federal Power Commission its authority to issue a certificate to serve an area already served by another company.

Conclusion.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

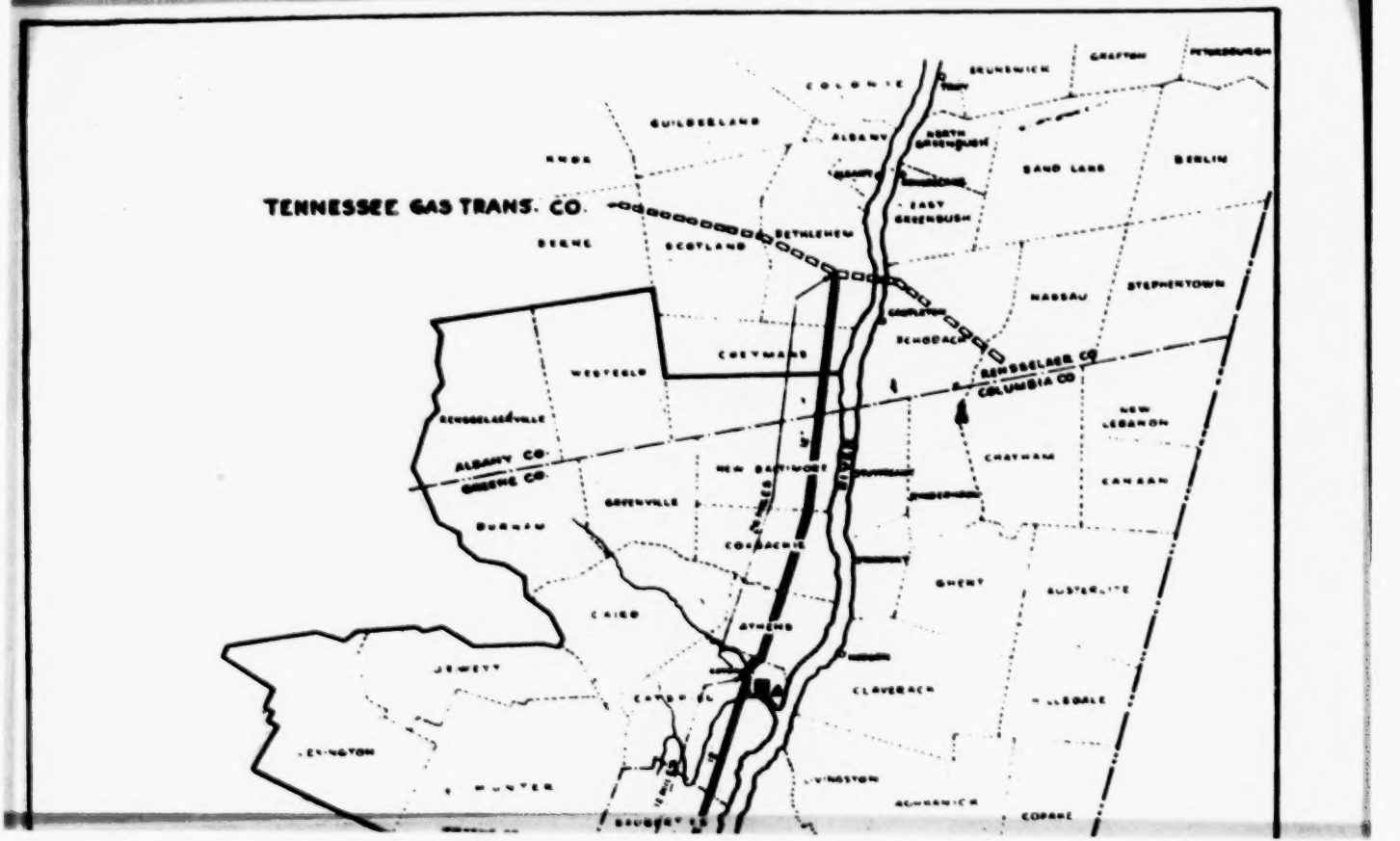
Morrell S. Lockhart
Theodore J. Carlson
Counsel for Respondent,
Central Hudson Gas & Electric Corporation.

July 10, 1956.

Appendix A.

A reproduction of Exhibit 159, Sheet 1 (R. 10836, J. App. 105a) being a map showing the transmission and distribution system of Central Hudson Gas & Electric Corporation, its connection with Home Gas Company and the proposed transmission line to connect with the northern line of Tennessee Gas Transmission Company.

(Opposite ☞)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GUILDERLAND
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NORTH GREENBUSH
BERLIN
SAND LAKE
KNOX
EAST GREENBUSH
BERNE
SCOTLAND
BETHLEHEM
NASSAU
STEPHENTOWN
SCHODACK
COEYMANS
RENSSELAER CO.
COLUMBIA CO.
WESTERLO
NEW LEBANON
CHATHAM
ALBANY CO.
GREENE CO.
NEW BALTIMORE
CANAAN
GREENVILLE
DURHAM
COXSACKIE
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ATHENS
JEWETT
CLAVERACK
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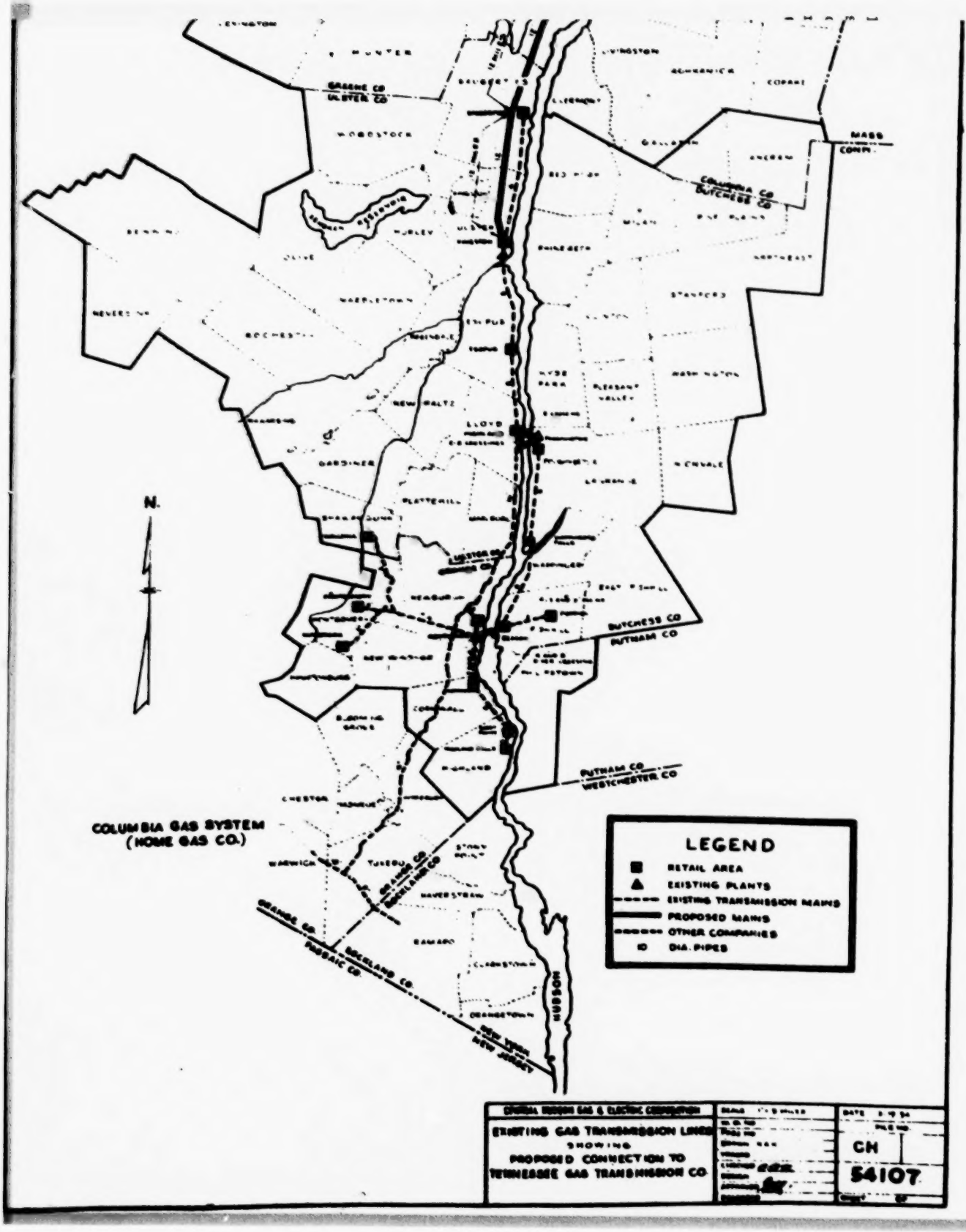
N.
COLUMBIA GAS SYSTEM
(HOME GAS CO.)
LEGEND
RETAIL AREA
EXISTING PLANTS
EXISTING TRANSMISSION MAINS
PROPOSED MAINS
OTHER COMPANIES
DIA. PIPES
EXISTING GAS TRANSMISSION LINES
SHOWING
PROPOSED CONNECTION TO
TENNESSEE GAS TRANSMISSION CO.
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APPENDIX A

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	10
Conclusion	17
Appendix	18–20

CITATIONS

Cases:	
Arkansas-Louisiana Gas Company v. *Federal Power Commission*, 113 F. 2d 281 (C. A. 5)	12
Kentucky Natural Gas Corp. v. *Federal Power Commission*, 159 F. 2d 215 (C. A. 6)	11, 12
Manufacturers Light and Heat Co. v. *Federal Power Commission*, 206 F. 2d 404 (C. A. 3)	13
Panhandle Eastern Pipe Line Co. v. *Federal Power Commission*, 169 F. 2d 881 (C. A. D. C.), certiorari denied, 335 U. S. 854	11, 12, 14
Statute:	
Natural Gas Act of 1938, 52 Stat. 821, as amended by 56 Stat. 83 (15 U. S. C. 717, et seq.):	
Sec. 7	2, 18–20
Sec. 7 (a)	13, 14, 18
Sec. 7 (c)	18–19
Sec. 7 (e)	13–14, 20
Sec. 7 (g)	11, 20
Sec. 19 (b)	9
Miscellaneous:	
H. Rep. No. 1290, 77th Cong., 1st Sess., p. 4	12

391290—56——1

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 160

HOME GAS COMPANY AND THE MANUFACTURERS LIGHT AND HEAT COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinions, findings, and order of the Federal Power Commission (R. 30a–51a, 94a–103a) are unreported. The opinion of the Court of Appeals (Pet. App. A, 21–30) is reported at 231 F. 2d 253.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit (Pet. App. B, 31) was entered on March 15, 1956. The petition for a writ of certiorari was filed on June 12, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, under Section 7 of the Natural Gas Act, the Federal Power Commission had authority to order Tennessee Gas Transmission Company to supply distributing companies with a limited supplementary supply of natural gas in addition to the supply furnished by petitioners under prior certificates of convenience and public necessity.

2. Whether, in the circumstances of this case, the Commission properly directed Tennessee to supply the distributing companies with a limited supplementary quantity of natural gas in addition to the supply furnished by petitioners under the prior certificates of convenience and public necessity.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended by 56 Stat. 83 (15 U. S. C. 717, *et seq.*), are set forth in the Appendix, *infra*, pp. 18–20.

STATEMENT

By order issued February 11, 1955, the Federal Power Commission directed the Tennessee Gas Transmission Company to deliver and sell certain quantities of natural gas to Rockland Light and Power Company and Central Hudson Gas & Electric Corporation. A joint petition for rehearing, filed by Home Gas Company and Manufacturers Light and Heat Company, intervenors in the proceedings before the Commission, was denied by the Commission by order issued April 4, 1955, as amended May 9, 1955. Home and Manufacturers then filed a petition for review

with the Court of Appeals for the District of Columbia Circuit and now seek review in this Court of the judgment of the Court of Appeals affirming the Commission's orders.

The parties. Rockland is a New York corporation, engaged in the local distribution of natural gas in some 40 communities in Orange and Rockland Counties, New York. Rockland obtains its natural gas supply from Home and in part from Algonquin Gas Transmission Co. The territory served by Rockland is a rapidly growing section of the New York metropolitan area, located west of the Hudson River and just north of the New York-New Jersey state line, the southeastern tip of which is located only 10 miles from New York City. The tremendous growth in demand for natural gas service in the Rockland market area is such that Rockland anticipates that its gas requirements will almost double over the next 5 years. A portion of the proposed 24-inch Tennessee pipeline, terminating at Greenwich, Connecticut, will pass through Rockland County adjacent to existing facilities of Rockland. (R. 6a–10a; 43a–46a; Exhs. 165, 166, Tr. 10857, 10897.)

Central Hudson is another New York corporation, engaged in the business of distributing gas and electricity in the Hudson River Valley. Tennessee's main line to New England crosses the Hudson near Albany, north of the territory served by Central Hudson. The latter distributes natural gas at retail to consumers in the City of Poughkeepsie, Beacon, Newburgh, and Kingston and in certain towns and villages located in Dutchess, Orange and Ulster Counties, New

York. Prior to July 1, 1950, Central Hudson supplied its customers with manufactured gas from plants located in Poughkeepsie, Kingston, and Catskill. Two of these gas plants (Poughkeepsie and Kingston) are still in existence and are used on a standby basis for emergencies and peak demands. Since July 31, 1951, Central Hudson has been supplying its gas customers with natural gas purchased from Home. (R. 11a–16a; 22a–27a; 46a–49a.)

Home and Manufacturers are wholly owned subsidiaries of the Columbia Gas System, Inc. Columbia is divided into three "groups," Pittsburgh, Charleston, and Columbus. Home and Manufacturers constitute the major portion of the Pittsburgh group, which also includes a number of retail distribution companies. Home supplies natural gas to Rockland and Central Hudson, which it obtains from Manufacturers, its sole supplier. (R. 3a–5a; 17a–21a; 32a–34a.)

The proceedings before the Commission. The orders of the Commission were entered after a hearing in proceedings in which Tennessee sought approval for a major expansion of its facilities into the Greater New York market, then serviced in part by Trans-Continental Gas Pipeline Corp. (Transco). Transco responded to the Tennessee proposal by filing a competing proposal in which it proposed to render substantially the same service in the New York metropolitan area to the exclusion of Tennessee.

Rockland and Central Hudson intervened in the Tennessee-Transco proceeding and urged that any certificate authorizing Tennessee's expansion into the

Greater New York area require Tennessee to make available an additional firm supply of gas to them. (R. 6a–10a; 11a–16a). In its intervention petition (R. 6a–10a; 43a–46a), Rockland alleged that its gas requirements would almost double over the next five years; that these requirements cannot be met beyond 1955 under the contract demands provided in the existing service agreements with its present suppliers, Home and Algonquin Gas Transmission Co.; that it has no assurance that such additional supplies can or will be made available from the present supply; and that purchase of gas from Tennessee's proposed new line through Rockland County is the most feasible and economical solution to its gas supply problem. Rockland claimed other important benefits including large savings in the cost of purchased gas, amounting to approximately $150,000 annually, because of the difference in rates between Tennessee and Home, and the fact that delivery by Tennessee will render unnecessary the looping of Rockland's existing facilities, which would be required in order to purchase its expanding requirements solely from Home. Finally, Rockland emphasized the protection afforded by the proposed Tennessee connection against failure of the gas supply due to a line break or other emergencies affecting Home's system or Rockland's own distribution facilities. (R. 6a–10a; 43a–46a.)

Central Hudson alleged in its application under Section 7 (a) of the Natural Gas Act (R. 22a–27a) and in its petition to intervene (R. 11a–16a; 46a–49a) that a connection with the Tennessee system was necessary for the normal development of its gas busi-

ness and the development of its northern territory. It stated that it would continue its gas purchases from Home and Manufacturers to the extent required by Home's present contract demand rate, and proposed the purchase of 8,000 Mcf of gas per day from a point of delivery on Tennessee's northern line near Albany by constructing a 12-inch transmission main southward on the west side of the Hudson River for about 40 miles to the presently existing system of Central Hudson at Kingston, New York. Central Hudson asserted that purchases from Tennessee would provide a second supply of natural gas, improve the adequacy and reliability of the service to its customers, permit it to realize substantial economies through the purchase of gas at rates substantially lower than those of Home, retire most of its existing gas production equipment, and permit Central Hudson to develop markets in its northern territory which, in its judgment, could not be developed under the existing system. (R. 11a–16a, 22a–29a.)

Intervention petitions were filed, and allowed, by Home (R. 17a–21a; 32a–34a) and Manufacturers (R. 3a–5a) in which they opposed any action by the Commission requiring service by Tennessee to Rockland and Central Hudson.

By opinion and order issued December 28, 1954 (R. 35a–39a), the Commission approved a proposed settlement of the competing applications of Tennessee and Transco. The settlement provided, in substance, for a division of the proposed service in the metropolitan New York area between Tennessee and

Transco. With respect to the intervention petitions of Central Hudson and Rockland, Home and Manufacturers, the Commission deferred decision on the merits of the issues raised by the intervenors until after further oral argument. (R. 37a–38a).[1]

Following such argument, the Commission ordered Tennessee to deliver and sell natural gas (1) to Rockland not in excess of 5,000 Mcf per day for two years beginning December 1, 1955, and not in excess of 7,000 Mcf per day thereafter; and (2) to Central Hudson not in excess of 4,500 Mcf per day for two years beginning December 1, 1955, and not in excess of 6,500 Mcf per day thereafter. (R. 50a–51a.) In so ordering, the Commission found that the program outlined by Rockland and Central Hudson would not injure Home, since any reductions in the volumes Home sold to Rockland and Central Hudson would be small and more than offset by the growing requirements of Home's other customers. However, in order to insure that future deliveries by Tennessee would not injure Home, the Commission placed limits

[1] In deferring action on the intervenors' petition, the Commission noted (R. 37a–38a):

"* * * Although we find, as outlined in greater detail in a subsequent portion of this opinion, that Tennessee has sufficient capacity and gas to enable it to render the service requested by Central Hudson and Rockland, in addition to all the allocations of gas made against the Tennessee system in this order, there are other serious and difficult questions of fact, law and policy which must be resolved before this particular matter can be decided. A full record was made at the hearing just concluded and no further testimony appears to be required. However, we feel that oral argument of this particular matter before the Commission would aid us in arriving at our final decision."

upon the peak and annual deliveries by Tennessee substantially below the allocations requested. (R. 50a–51a.)

The Commission further found that Rockland's estimates of increase in gas needs were reasonable, that any expenditure required by Rockland to enable it to receive gas from Tennessee would be negligible, and that Rockland would save approximately $164,000 in 1956, and $207,000 in 1958, over and above savings to be effected with the use of Tennessee's proposed storage service and the elimination of additions which would be necessary in order to take Rockland's expanding requirements from Home. (R. 42a–46a.) The Commission found also, *inter alia,* that Central Hudson had been reluctant to place full dependence upon Home for its entire supply because its connections with Home are by river crossings and because of other possibilities of interruption attributable to the nature of its system. Consequently, Central Hudson had maintained its old manufactured-gas plants, with a total capacity very nearly equal to its peak requirements, as standby emergency equipment. With a second source of supply, Central Hudson would be able to retire its manufactured-gas facilities and develop and serve with natural gas, areas now served entirely with manufactured gas. (R. 46a.)

Proceedings in the court below. Following the Commission's denial of their applications for reconsideration and rehearing (R. 52a–93a, 94a–103a), Home and Manufacturers sought review in the court

below.[2] The Court of Appeals unanimously affirmed, holding petitioners' contention, that the Commission's order would result in an economic loss to them, to be unsubstantiated. (Pet. App. A, 26.) The court noted that the Commission had given full consideration to the possibility of loss of anticipated future profits by Home and, to foreclose such a possibility, the Commission's order expressly limited the quantities of gas to be supplied by Tennessee to Rockland and Central Hudson. (Pet. App. A, 26.) Further, the court found that there was substantial evidence in the record to support the contention that the private consumer would benefit by the intervenors' purchase of gas from Tennessee (Pet. App. A, 26–27):

> Not only is there the possibility that the individual consumer will be able to buy gas at a cheaper rate per Mcf but the Tennessee connection at the northern end of intervenors' extensive pipeline system will provide protection against failure of gas supply due to a line break or other emergencies affecting Home's line and intervenors' own distribution facilities. Furthermore, Tennessee's added service as a second source of supply will render unnecessary the looping of Rockland's existing 6-inch feeder main to Orangeburg, New York, and permit, in addition, the development of markets in Central Hudson's northern territory. Of course, this creates an advantage to

[2] Tennessee did not seek review of the Commission's order directing it to furnish gas to Rockland and Central Hudson. The Commission found that Tennessee is "able and willing properly to do the acts and to perform the service proposed, and to conform to the provisions of the Natural Gas Act and the requirements, rules and regulations of the Commission thereunder." (R. 50a.)

> the intervenors but, again more important, the ultimate benefit will be enjoyed by the individual consumer, thus inuring to the public interest.

The court went on to reject petitioners' contention that the Commission's order deprived them of rights granted them by their certificates of public convenience and necessity. The court commented that, although Home had heretofore been the sole supplier of Rockland and Central Hudson, nothing in the Natural Gas Act precluded the Commission from requiring, as a condition to its granting a certificate of public convenience and necessity to Tennessee, that Tennessee supply limited quantities of gas to Rockland and Central Hudson, thereby affording those distributors a secondary source of supply.[3]

ARGUMENT

The Commission issued a certificate of convenience and necessity to Tennessee to serve a portion of the New York area on the condition that Tennessee deliver and sell limited quantities of natural gas to Rockland and Central Hudson. As the pre-existing supplier of gas to both these companies under prior certificates of convenience and necessity, Home claims to be aggrieved by the Commission's order and advances several contentions why the Commission's ac-

[3] Home and Manufacturers moved, under Section 19 (b) of the Act (15 U. S. C. 717r (b)), in the court below for leave to adduce additional evidence to be taken before the Commission. This motion was denied by the court. (Pet. App. A, 30.) The present petition does not take issue with this aspect of the decision.

tion was improper. These arguments were fully considered by both the Commission and the court below and, we submit, correctly found to be without merit.

1. (a) As holders of previously issued certificates of convenience and necessity, petitioners imply that the Commission has exceeded its authority in directing a second supplier of natural gas to provide supplementary service to Rockland and Central Hudson. Their position finds no support in the Natural Gas Act, however, and on two previous occasions Courts of Appeals in similar circumstances have held that "nothing in the Natural Gas Act suggests that Congress thought monopoly better than competition or one source of supply better than two, or intended for any reason to give an existing supplier of natural gas for distribution in a particular community the privilege of furnishing an increased supply." *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F. 2d 881, 884 (C. A. D. C.), certiorari denied, 335 U. S. 854; *Kentucky Natural Gas Corp.* v. *Federal Power Commission*, 159 F. 2d 215 (C. A. 6).

The Commission's general authority to direct a second supplier to service an area already being served by another natural gas company is expressly reserved by Section 7 (g) of the Natural Gas Act (App. p. 20) which provides that:

> Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of convenience and necessity for service of an area al-

> ready being served by another natural-gas company.[4]

Clearly, therefore, the mere fact that Tennessee, under the Commission's order, will serve Rockland and Central Hudson along with Home affords no basis for attack upon the order. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission, supra; Kentucky Natural Gas Corp.* v. *Federal Power Commission, supra;* cf. *Arkansas Louisiana Gas Company* v. *Federal Power Commission,* 113 F. 2d 281 (C. A. 5).

(b) Neither is there merit to petitioners' contention that the Commission, under Section 7 (a) of the Act (App. p. 18), is powerless to order Tennessee, in a Section 7 (c) proceeding, to provide additional service to Central Hudson. Section 7 (a) confers jurisdiction upon the Commission to require a physical connection of transportation facilities and extensions of service to communities immediately adjacent to such facilities, whenever the Commission, after notice and opportunity for hearing, finds that such action will place no undue burden upon the company. Section 7 (a) further provides:

> That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or to sell natural gas when to do so

[4] "[Section 7 (g)] is a saving clause inserted solely to make clear that the Commission will not be deprived of authority, in a proper case, to issue certificates for extensions to serve an area already being served by another natural-gas company." H. Rep. No. 1290, 77th Cong., 1st Sess., p. 4.

would impair its ability to render adequate service to its customers.

In its order here, the Commission specifically found (R. 50a) that:

> (5) The physical interconnections of facilities and the services hereinafter ordered to be provided by Tennessee to Rockland and Central Hudson are necessary and desirable in the public interest, and will place no undue burden upon Tennessee. Such interconnections and sales will not require the enlargement of Tennessee's facilities, nor will they impair Tennessee's ability to render adequate service to its existing and authorized customers.[5]

Petitioners would read into Section 7 (a) the further limitation that the Commission may not direct interconnection with and service to an area already being served by a natural gas company, but their position, as noted by the court below (Pet. App. A, 30), is not sustained either by the language of the Act or by its legislative history. Cf. *Manufacturers Light and Heat Co.* v. *Federal Power Commission*, 206 F. 2d 404 (C. A. 3).

Moreover, Section 7 (e) (App. p. 20) provides that:

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[5] Intervention in a pipeline certificate application is the usual method by which local distributing companies and communities along the route of an interstate pipeline obtain initial and additional gas supplies. See, *e. g.*, the Commission's order and opinion in the Tennessee-Transco proceeding (R. 35a–39a), where the Commission consolidated for hearing numerous Section 7 (a) applications for service from Tennessee and Transco filed by local distributing companies.

> * * * The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

The Commission's order was issued in the consolidated Tennessee-Transco proceeding and, in directing Tennessee to provide limited service to Rockland and Central Hudson, the Commission made the findings essential to Sections 7 (e) as well as to Section 7 (a). (R. 49a–50a). The order is, therefore, authorized by both Sections 7 (a) and 7 (e) of the Act.

2. The Commission's general authority to issue the order being clear, its validity must be measured with due deference to the discretion with which the Commission is vested in passing on questions of public convenience and necessity. Under that standard the conclusion that the additional services directed to be applied by Tennessee to Rockland and Central Hudson "are necessary and desirable in the public interest" (R. 50a) cannot be rejected. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 169 F. 2d 881 (C. A. D. C.), certiorari denied, 335 U. S. 854.

(a) The record demonstrates that the additional supply of gas to be made available by Tennessee provides a feasible and economical solution to Rockland's gas supply problem. Not only does the Commission's order provide an additional gas supply with which to meet Rockland's rapidly growing demands, but, as noted by the Commission (R. 42a, 43a–46a) and the court below (Pet. App. A, 26–27), the Tennessee

connection will provide protection against failure of gas supply due to a line break or other emergency affecting Home's line or Rocklands' own extensive distribution facilities (R. 248a); in addition, it will render unnecessary the looping of Rockland's existing 6-inch feeder main to Orangeburg, New York (R. 247a, 248a, 316a–319a, 332a), which would be necessary if Rockland were required to rely upon Home to meet its expanding requirements.

Similar advantages accrue to Central Hudson by the order. Because Central Hudson's connections with Home are by river crossings, its natural gas supply is particularly susceptible to interruptions. For this reason, among others, Central Hudson has been reluctant to place full dependence upon Home for its entire supply and has maintained manufactured-gas plants, with a total capacity approximating its peak requirements, as standby emergency equipment. With a second source of supply of natural gas, Central Hudson could largely retire its manufactured-gas facilities and could develop and serve with lower-cost natural gas market areas now entirely dependent upon manufactured gas (R. 46a).

Finally, in the case of both Rockland and Central Hudson, the price differential between gas purchased from Home and gas to be purchased from Tennessee is significant and will result in considerable savings to the ultimate consumer (R. 99a–101a; Pet. App. A, 26).

(b). While these considerations afford compelling support for the Commission's conclusion that a second source of supply to Rockland and Central Hud-

son was necessary and desirable in the public interest, the Commission was not unmindful of the "countervailing equities" (R. 42a). It recognized that, if Home's market for gas was impaired, Home and its customers might sustain an increased burden. Accordingly, the Commission scrutinized the applications of both Rockland and Hudson to determine whether the service requested could be directed without injury to Home and concluded (R. 43a) that the "public interest requires a limitation on such service so that the service by Tennessee to these two companies, taken together, will not have a significant effect upon Home's sales."

To forestall the possibility of economic harm to Home, the Commission specifically limited the quantities of gas to be supplied to Rockland and Central Hudson by Tennessee (R. 50a–51a). Petitioners' major complaint in this Court (Pet. 10–14) is, therefore, ill-founded for, as observed by the Commission (R. 102a):

> Even with the authorization of service by Tennessee to Rockland and Central Hudson, there is every indication that the requirements of such companies upon Home will continue to grow. The growth estimates of such companies were relative conservative, and both companies are optimistic of a greater rate of growth than their estimates indicate. If such occurs, with the limitations upon Tennessee's service herein imposed, both peak and annual requirements upon Home should be greater than presently indicated. * * *

These observations are borne out by the record; as the Court of Appeals noted (Pet. App. A, 25, fn. 2): "The tremendous growth in residential and industrial expansion of the territories now being served by [Central Hudson and Rockland] is such that [they] anticipate that their gas requirements will double within the next five years." Moreover, the Commission found (Pet. App. A, 26) that "there is no basis in the record for concluding that under Home's present rates, Home's sales will deteriorate with the authorized service to a point where Home's return is inadequate." And, as the Court of Appeals remarked, "the ultimate benefit will be enjoyed by the individual consumer, thus inuring to the public interest" (Pet. App. A, 27).

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

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JULY 1956.

APPENDIX

Section 7 of the Natural Gas Act of 1938, 52 Stat. 824 as amended by 56 Stat. 83, 15 U. S. C. 717f, provides in pertinent part as follows:

> (a) Whenever the Commission, after notice and opportunity for hearing finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.
>
> * * * * *
>
> (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions

thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * *

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

U. S. GOVERNMENT PRINTING OFFICE: 1956

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No. 148

In the

Supreme Court of the United States

October Term, 1956

Rose Gas Company, Inc.,
The Manufacturers Light and Heat Company,
Petitioners

v.

Federal Power Commission,
Consolidated Gas & Electric Corporation and
Rockland Light and Power Company, *Respondents*

On Petition and a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR RESPONDENT ROCKLAND LIGHT AND POWER COMPANY IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1956

No. 160

HOME GAS COMPANY and
THE MANUFACTURERS LIGHT AND HEAT COMPANY,
Petitioners

v.

FEDERAL POWER COMMISSION,
CENTRAL HUDSON GAS & ELECTRIC CORPORATION and
ROCKLAND LIGHT AND POWER COMPANY, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM FOR RESPONDENT ROCKLAND LIGHT AND POWER COMPANY IN OPPOSITION

Respondent, Rockland Light and Power Company (Rockland) adopts the full text of the Brief for the Federal Power Commission in Opposition to the Petition for a Writ of Certiorari.

Without repeating the Commission's arguments, which are both correct and compelling, Rockland, by this Memorandum, submits a brief statement of certain additional reasons for the denial of the petition.

1. The keystone of petitioners' argument is the contention that the Federal Power Commission (Commission) has no authority under the Natural Gas Act (52 Stat. 821) to certificate or direct a second or additional pipeline supplier to sell supplementary supplies of natural gas to a distributing company unless such supplementary sales will not "displace" any part of the service rendered by the original certificated supplier. The Natural Gas Act does not impose such a limitation upon the Commission's powers.

Moreover, the facts of the instant case directly refute the substance of petitioners' argument. The record clearly shows that Rockland's purchases of gas from Tennessee Gas Transmission Company (Tennessee) in the limited volumes permitted by the Commission *will not displace* the service rendered by petitioner, Home Gas Company (Home) to Rockland. On the contrary, the uncontradicted evidence of record discloses that the gas requirements of that portion of the metropolitan New York area served at retail by Rockland are growing so rapidly that Rockland will still require *increasing* quantities of gas from Home even though Rockland obtains a supplementary supply from Tennessee.

On an annual basis, Rockland's estimated requirements from Home will be greater in each of the years 1955-1959 than they were in 1954. The yearly volumes are as follows (J. App. 130a):

Year	Requirements from Home (Mcf)	Increase Over 1954 (Mcf)
1954	3,428,193	
1955	3,808,605	380,412
1956	3,549,395	121,202
1957	4,020,814	592,621
1958	4,348,610	920,417
1959	4,996,797	1,568,604

Rockland's peak day requirements from Home are also estimated to increase substantially (J. App. 131a) and the characteristic pattern or "load factor" of such purchases will remain constant for several years and then will rise (J. App. 246a, 247a). The allegation at Page 9 of the petition that Home will be "left with the widely fluctuating low load factor segment of the business" is directly contrary to the evidence.

2. Petitioners' claim of invasion of alleged certificate rights to supply Rockland's full requirements for natural gas is wholly inconsistent with the past and existing denial by petitioners of an equivalent obligation to meet Rockland's expanding requirements. In the past, Home has not kept pace with Rockland's growing needs (J. App. 245a, 246a); and Home's officials have consistently refused to give Rockland any firm commitment that Home will make sufficient gas available to meet Rockland's future requirements (J. App. 153a, 430a, 431a, 435a, 436a). Indeed, in 1953 at Commission Docket No. G-1901, Rockland sought an Order under Section 7(a) of the Natural Gas Act directing Home to provide Rockland with certain small quantities of gas. Home vigorously opposed Rockland's request and sought judicial review in the United States Court of Appeals for the Third

Circuit of the Commission's order directing the sale. Home's Petition for Review was withdrawn after a related matter was decided adversely to petitioner, Manufacturers. *The Manufacturers Light and Heat Company, et al.* v. *Federal Power Commission,* 206 F. 2d 404, C.A. 3rd (1953).

3. On the basis of the facts pertaining in the instant case there is no conflict between the decision of the Court of Appeals here challenged and any of the decisions of this Court or of other Courts of Appeals. The cases cited by petitioners arise under statutes dissimilar to the Natural Gas Act and are bottomed upon facts and circumstances wholly different from those in the instant proceedings.

The cases cited by petitioners dealing with deprivation of the right to be heard are particularly inapposite.[1] The petitioners in the instant case have been afforded the fullest measure of due process of law. Petitioners were permitted to and did intervene in the proceedings before the Commission; they cross-examined the witness presented by Rockland; they presented evidence of their own; they filed briefs; and they argued orally before the Commission. The Commismission gave full and earnest consideration to petitioners' testimony, evidence and argument, both in its original order and its order denying rehearing. And in both instances, after having weighed and balanced petitioners' interests against the public interest, including a concern for continuity and safety of opera-

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[1] *Federal Communications Commission* v. *National Broadcasting Company,* 319 U.S. 239 (1943); *Wilson* v. *Federal Communications Commission,* 170 F. 2d 793, C.A.D.C. (1948).

tions, the Commission rejected petitioners' contentions. Nothing new has been presented here.

Respectfully submitted,

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 160

HOME GAS COMPANY and THE MANUFACTURERS LIGHT AND HEAT COMPANY,
Petitioners,

v.

FEDERAL POWER COMMISSION, CENTRAL HUDSON GAS & ELECTRIC CORPORATION and ROCKLAND LIGHT AND POWER COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INDEX OF AUTHORITIES

	PAGE
Gas Supply Available to Various Corporations, Re, 75 PUR (NS) 323 (N. Y. P. S. C. 1948)	3
Panhandle Eastern Pipe Line Co., 90 PUR (NS) 223 (F. P. C. 1950)	4
Panhandle Eastern Pipe Line Co. v. *FPC*, 169 F. 2d 881 (D. C. Cir. 1948)	6
Phillips Petroleum Co. v. *Wisconsin*, 347 U. S. 672 (1954)	6
United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956)	6
Federal Power Commission, Release No. 3222, February 23, 1947	4
Petroleum Administration for Defense, Order No. 2, 16 Fed. Reg. 8111 (1951), amended, 17 Fed. Reg. 7786 (1952), rescinded, 18 Fed. Reg. 904 (1953)	3

IN THE

Supreme Court of the United States

October Term, 1956

HOME GAS COMPANY and THE MANUFACTURERS LIGHT AND HEAT COMPANY, *Petitioners,* *v.* FEDERAL POWER COMMISSION, CENTRAL HUDSON GAS & ELECTRIC CORPORATION and ROCKLAND LIGHT AND POWER COMPANY, *Respondents.*	No. 160

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

The importance of the question of law presented by the Petition—the extent of the Commission's power to *displace* an existing certificated service—is underlined by the efforts in the opposition briefs to avoid the question.

The record is clear, being embodied in the Commission's Order Denying Rehearing, that the Commission's order will cut Home's estimated annual sales to Central Hudson from 2,211,000 Mcf. in 1955 to 1,281,000 Mcf. in 1956—a 42% displacement. But the Commission Brief states the two questions, which it believes presented, in terms of the authority for and propriety of a Commission order to Tennessee to supply distributing companies "with a *limited sup-*

plementary supply" of natural gas *"in addition to"* the supply furnished by Home under prior certificates. And these phrases are echoed elsewhere in the opposition briefs.

No one can accurately describe an order which cuts Home's annual sales by 42% as one which merely orders a "limited" or "supplementary" supply "in addition to" the supply by Home. It is a description which carefully omits reference to *displacement* and the Commission's power to displace, which is the major question presented by the Petition.

Generally speaking, all of the opposition briefs avoid the question of law and becloud it by raising factual issues not raised in the Petition and not relevant to the questions of law which it presents.

The Rockland brief makes a categorical statement that its Tennessee purchases will not displace service rendered by Home (p. 2), but its tabulation (p. 3) shows the reduction of requirements from Home between 1955 and 1956 which results from the Tennessee purchases. Although much smaller than the estimated Central Hudson displacement, displacement it nevertheless is.

Rockland further attempts to negative the Petition's statement (pp. 8, 9) that the order will effect a "qualitative" as well as a "quantitative" displacement of Home's certificated service by saying (Rockland Br. p. 3):

> ". . . The allegation at Page 9 of the petition that Home will be 'left with the widely fluctuating low load factor segment of the business' is directly contrary to the evidence."

But the record shows that Mr. Hulswit, a witness for Rockland, testified that in his estimates for the future his assumptions were

> ". . . a pattern for the taking of Algonquin gas and a pattern for the taking of Tennessee gas and a *balance* of Home gas." (J. App. 326a, 327a)

And when asked what would happen to his estimated figures if weather were extremely mild, Mr. Hulswit said

> ". . . the decrease in gas requirement would fall entirely on the Home Gas Company." (J. App. 315a)

The Rockland brief implies, contrary to the fact, that Home's service in the past has been inadequate, saying (p. 3):

> ". . . In the past, Home has not kept pace with Rockland's growing needs (J. App. 245a, 246a); and Home's officials have consistently refused to give Rockland any firm commitment that Home will make sufficient gas available to meet Rockland's future requirements (J. App. 153a, 430a, 431a, 435a, 436a). . . ."

The Commission made no finding of inadequate service by Home (as it could not) and the Commission Brief here makes no such contention.

What the record at the pages cited by Rockland shows is:

(1) At J. App. 245a-246a, *first* that Home had agreed to the increased contract demand which Rockland requested for the then next winter's heating season and, *second* that Rockland had operated under "restrictions" of various kinds from December 1946 until August 1951. These were restrictions, imposed by the New York Public Service Commission, on the volumes of *increased* heating business which retail companies could undertake in specified periods, and are clearly no basis for an imputation of inadequate service by Home.*

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*See *Re Gas Supply Available to Various Corporations*, 75 PUR (NS) 323 (N. Y. P. S. C. 1948); see also similar restrictions imposed by Federal authority, Petroleum Administration for Defense, Order No. 2, 16 Fed. Reg. 8111 (1951), liberalized by amendment in 1952, 17 Fed. Reg. 7786, rescinded March 1, 1953, 18 Fed. Reg. 904.

Not only were such restrictions on *increased* heating usage widely imposed by State Commissions during the post-World War and Korean periods (consistent with the then limited availability of steel for new pipe line construction), but on occasion the Federal Power Commission actually took away from Columbia Gas System companies supplies of gas for which they had contracted, in order to allocate the gas to meet shortages elsewhere.*

(2) Rockland's second group of citations for the statement quoted above (J. App. 153a, 430a, 431a, 435a and 436a) deal largely with the fact that Home does not "*guarantee*" the supply for Rockland's estimated *increased* requirements, beyond the increased requirement for which Rockland contracts with Home and which is specified in the contract between them. Home is bound to serve that specified volume ("contract demand") for a long term future, *i.e.* to December 31, 1972 (J. App. 352a) and the contract provides the methods for increasing the contract demand. But beyond the amounts for which Home and its distributing company customers so contract, Home (like other companies in the Columbia Gas System) annually asks its customers for five year future estimates of growth, for which neither supplier nor customer contracts. These are obtained for the purpose of forward planning for future requirements. However, actually to provide the successive annual increases in requirements of the customers of a large interstate natural gas system necessitates obtaining, year by year, Commission certificates of convenience and necessity for the increased supplies the system procures from independent producers and long distance pipeline companies, and similar certificates

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*See Federal Power Commission Release No. 3222, February 23, 1947 and *Panhandle Eastern Pipe Line Co.*, 90 PUR (NS) 223 (F. P. C. 1950).

to construct the increased capacity in new or enlarged pipe lines and compressor stations to bring the increased supply to the distributing company customers. The fact that neither Home nor other Columbia System companies will "guarantee" increased supplies beyond those contracted for is irrelevant to the question whether adequate service has been or will be provided.

Rockland's exhibits in this record show that Home has supplied it with its constantly increasing requirements of gas over the periods covered by the exhibits, requirements which have increased from 2,539,892 Mcf. to 3,808,605 Mcf.*—approximately 50%—in the 4-year period from 1951 to 1955.

We have rebutted at such length the Rockland brief's imputation of inadequacy of service because Home's rendition of "full and adequate service" is a factual basis for the question of law which the Petition presents (see "Questions Presented" Pet. p. 2).**

As we have pointed out, the Commission made no finding that there was any inadequacy in Home's service either to Rockland or Central Hudson.

The question of law remains: In such a case, does the Commission have legal power to displace an existing certificated service?

In so far as they refer to the question of law at all, the opposition briefs do so by asserting and arguing that there is no conflict between circuits as to the question presented and no conflict with decisions of this Court.

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*The 1951 figure from Rockland's Exhibit 165, Sheet No. 3, J. App. 118a; the 1955 figure (estimated) from its Exhibit 214, Sheet No. 1, J. App. 130a.

**There are, of course, many other factual statements in the briefs in opposition, not relevant to the question of law, with which we take issue.

The Petition does not assert a conflict between circuits, which we realize does not exist. As to the decisions of this Court, we stated that none had been rendered dealing with Certificates under the Natural Gas Act, but that "to the extent that decisions relating to Certificates under other acts express applicable principles of law and statutory interpretation, the decision in the instant case conflicts with applicable decisions of this Court" (Pet. p. 14). The decisions which we then cited and discussed amply support this statement.

The extent of the Commission's legal power is of vital importance in an industry as completely regulated as the interstate natural gas industry, having so great an investment in immovable facilities and by its nature so concentrated on a relatively few wholesale transactions (Pet. pp. 10-14). In the interests both of the Commission and of the industry, questions of Commission legal power should be authoritatively decided at as early a stage as possible in the development of regulatory policy. Questions of such power brought to this Court have, on occasion, resulted in decisions diametrically opposed to concepts on which the Commission had for long years based its regulatory action, and have subjected both the Commission and the industry to arduous readjustments. See, *e.g.*, *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672 (1954), *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956).

We believe that there has been inadequate consideration of the basic problem of Commission power to displace service by a certificated supplier. The inadequacy of this consideration is illustrated, we submit, by the frequent quotation of the language from the opinion in *Panhandle Eastern Pipe Line Co.* v. *FPC*, 169 F. 2d 881, 884 (D. C. Cir. 1948) which the Commission brief quotes again at page 11:

> ". . . 'nothing in the Natural Gas Act suggests that Congress thought monopoly better than compe-

> tition or one sour one source of supply better than two, or intended for anyl for any reason to give an existing supplier of natural gas fral gas for distribution in a particular community the priv the privilege of furnishing an increased supply.' . . ." . . ."

The final words—"furs—"furnishing an *increased* supply"—probably make the sentencesentence entirely inapplicable to the question of *displacement*. But*t*. But beyond this, we say—with great respect for the Court' Court which uttered it—that this sweeping negative generalizeneralization does not penetrate very profoundly into the baside basic problem. That problem is, in the interstate natural gasral gas industry, which is completely regulated—as to the newle new customers which it can serve, the construction it can u can undertake, the service which it can abandon and the ratele rates which it can charge to meet competition (both their their level and their form)—what protection does the law g law give to the billions of dollars of investment in immovable fable facilities, the value of which can be completely destroyed by d by deprivation of certificated markets?

We do not pretenpretend that the problem is an easy one. But no light is shed ued upon it by such generalizations as "nothing . . . suggsuggests that Congress thought monopoly better than competitpetition" or thought "one source of supply better than two". T". These catch phrases were quoted in the Commission brief bief below, by the Court of Appeals in its opinion below (p. 28p. 28, Appendix A to our Petition), and by the Commission brf brief here (p. 11). The mere fact that the Commission and and the Court of Appeals treat such phrases as a sapient contribtribution to the solution of this difficult and complex problem dn demonstrates, we submit, that this Court should grant certiorarari and define the Commission's powers to displace certificficated service and thereby impair the in-

vestment in the nation's tremendous natural gas plant and facilities.

Respectfully submitted,

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